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Explaining One-Way Fee Shifting

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ESSAY

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INTRODUCTION

IN its blueprint for reform of the civil justice system, President Bush's Council on Competitiveness recommended a federal moratorium on one-way attorney fee shifting statutes.[1] President Bush implemented that recommendation in an Executive Order that discourages federal agencies from seeking legislative enactment of additional one-way fee shifting measures.[2] President Clinton has not removed the pall on one-way fee shifting cast by his predecessor.[3]

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[1] President's Council on Competitiveness, Agenda for Civil Justice Reform in America 25 (1991). President Bush established the Council to propose reforms to reduce the number of federal laws and regulations that increase business costs in areas such as health, safety, and the environment. See, e.g., Bennett Harrison, The Real Council on Competitiveness, Tech. Rev., July 1992, at 65. One facet of the inquiry focused on the perceived excessive cost of the justice system. In addition to suggesting other reforms, such as restricting availability of punitive damages and encouraging alternative dispute resolution, the Council recommended limiting one-way fee shifting. President's Council on Competitiveness, supra, at 9-11.

[2] Exec. Order No. 12,778, 3 C.F.R. 359, 365 (1991), *reprinted in* 28 U.S.C.A. § 519 (West Supp. 1993). The Order directs agencies to recommend one-way fee shifting only if they can demonstrate that the benefits of such fee shifting, which are not defined, exceed its costs. No similar requirement is imposed for any other fee shifting arrangement. Executive branch agencies are currently complying with the Order. See, e.g., 58 Fed. Reg. 27,774 (1993) (stating that the Department of Agriculture marketing order has been reviewed under the Order); 58 Fed. Reg. 25,929 (1993) (stating that the Small Business Administration subcontracting program for small businesses has been reviewed under the Order). For earlier efforts by the Reagan administration to restrict availability of one-way fee shifting statutes benefiting public interest groups, see Robert V. Percival & Geoffrey P. Miller, The Role of Attorney Fee Shifting in Public Interest Litigation, Law & Contemp. Probs., Winter 1984, at 233, 242-43.

[3] See supra note 2. President Clinton, however, has disbanded the Council. James Risen, Clinton Kills Controversial Quayle Panel, L.A. Times, Jan. 23, 1993, at A14.

The current Executive Order recommends instead either fidelity to the so-termed "American rule" of attorney fees, with each litigant bearing its own fees,[4] or adoption of two-way fee shifting.[5] The allure of those fee rules is easily understood. Under the American rule,[6] neither prevailing plaintiffs nor defendants in common law actions can recover attorney fees, unless the parties so stipulate by contract. In comparison to one-way fee shifting, therefore, fewer suits should be brought.[7] Less litigation should ensue under two-way fee shifting than under one-way fee shifting because potential litigants may be deterred from litigating by the prospect of paying their adversaries' fees.[8] There is also an appealing symmetry to the two rules—plaintiffs and defendants are treated equivalently.

Justification for one-way fee shifting is more problematic and has received surprisingly little attention from commentators.[9] No pretense at equal treatment is maintained, for Congress has intervened to

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[4] See generally Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) (discussing the history and scope of the American rule).

[5] Exec. Order No. 12,778, supra note 2, at 362-63. See also Dan Quayle, Civil Justice Reform, 41 Am. U. L. Rev. 559, 567-68 (1992).

[6] For a history, see John Leubsdorf, Toward a History of the American Rule on Attorney Fee Recovery, Law & Contemp. Probs., Winter 1984, at 9 (explaining that the American rule originated because it enabled attorneys to charge their clients what the market would bear rather than holding them to a legislatively capped rate at which they could collect from the defeated party); see also *Alyeska Pipeline*, 421 U.S. at 247-69 (discussing history of the rule and reflecting commitment to preserve the rule absent legislation).

[7] See Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. Legal Stud. 55, 60-61 (1982); Richard A. Posner, Economic Analysis of Law 537-42 (3d ed. 1986).

[8] See Shavell, supra note 7, at 61. However, a two-way fee shifting system would discourage litigation only when plaintiffs are not very optimistic about their chances of winning. Id. at 58-60. To the extent that a litigant's probability of success approaches certainty, the prospect of paying its adversary's fees should not affect its decision to sue. See Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, Law & Contemp. Probs., Winter 1984, at 139, 149. In contrast, Judge Posner apparently suggests that, even though there is likely to be more nuisance claims under one-way fee shifting, overall there should be more litigation under two-way fee shifting, perhaps because of the difficulty of settlement. Posner, supra note 7, at 542.

[9] The efficacy of one-way fee shifting in general may have become lost in the shadow cast by the debate between proponents of the American and British rules. See, e.g., John J. Donohue III, Commentary, Opting for the British Rule, Or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?, 104 Harv. L. Rev. 1093 (1991); Albert A. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792 (1966); Avery Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J.L. Econ. & Organization 143 (1987); Posner, supra note 7; Shavell, supra note 7. A notable exception is Rowe, supra note 8 (discussing one-way fee shifting in addition to the British and American rules).

confer advantage on one particular side of the controversy. Indeed, previous Congresses have made significant inroads upon the American rule. They have authorized one-way fee shifting in over 100 circumstances, almost half involving private litigants suing federal or state governments.[10] For example, the Equal Access to Justice Act ("EAJA")[11] directs courts to award attorney fees to private parties of modest means[12] who prevail in non-tort civil litigation against the United States.[13] The Freedom of Information Act ("FOIA")[14] and Privacy Act also provide for one-way fee shifting against the federal government.[15] To govern conduct in the private sector, Congress has

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[10] See generally Henry Cohen, Congressional Res. Serv., Awards of Attorneys' Fees by Federal Courts and Federal Agencies (1989) (discussing the statutory exceptions to the American rule).

[11] 5 U.S.C. § 504, 28 U.S.C. § 2412, 42 U.S.C. § 1988 (1988). For the legislative history of the Act, see H.R. Rep. No. 1434, 96th Cong., 2d Sess. (1980); H.R. Rep. No. 120, 99th Cong., 1st Sess. (1985); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980); S. Rep. No. 253, 96th Cong., 1st Sess. (1979).

The Act covers certain agency as well as court proceedings. In 28 U.S.C. § 2412(d)(3), the Act provides that fees may be awarded "to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5." Section 504 in turn provides that an adversary adjudication is one under § 554 in which the United States' position is represented, but does not include a rate-fixing or licensing proceeding. 5 U.S.C. § 504 (1988). Although proceedings before agency boards of contract appeals are not adjudications under 5 U.S.C. § 554 (1988), fees are available under the Act.

[12] The Act precludes awards to large parties. 28 U.S.C. § 2412(d)(2)(B). According to the Act:

> "Party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed . . . .

Id. The tax fee shifting statute also limits eligibility to those meeting the criteria set forth in 28 U.S.C. § 2412(d)(2)(B). 26 U.S.C. § 7430(c)(4)(A) (1988).

[13] The EAJA provides that such private parties may recover attorney fees against the federal government only if the government cannot demonstrate that its position was "substantially justified," 28 U.S.C. § 2412 (d)(1)(A), which has been construed to require the government to demonstrate that its position had a reasonable basis in both law and fact. Pierce v. Underwood, 487 U.S. 552 (1988). Fees under the EAJA also can be awarded to private parties, irrespective of the substantial justification of the government's position, "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b).

[14] 5 U.S.C. § 552(a)(4)(E) (1988) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.").

[15] 5 U.S.C. § 552a(g)(3)(B) (1988) ("The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.").

also enacted approximately fifty one-way fee shifting statutes,[16] such as the Truth in Lending Act ("TILA")[17] and Title VII.[18] Some statutes shift fees only upon an independent determination of government fault, like the EAJA,[19] and others, like Title VII, shift fees automatically whenever the private party prevails.[20]

From the Bush administration's perspective, one-way fee shifting statutes may represent the spoils gained by those who frequently litigate against the government and certain large private entities.[21] The Chamber of Commerce and small business interests, for instance, actively pushed for enactment of the EAJA,[22] and public interest

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16 See Cohen, supra note 10.

17 15 U.S.C. § 1640(a) (1988).

18 42 U.S.C. § 2000e-5(k).

19 Prevailing plaintiffs can recover their fees only if the government cannot demonstrate that its position was "substantially justified." 28 U.S.C. § 2412(d)(1)(a).

20 42 U.S.C. § 2000e-5(k).

21 Indeed, the ABA vigorously opposed the Council on Competitiveness' report and recommendations. See American Bar Ass'n, ABA Blueprint for Improving the Civil Justice System 89-90 (1992); Kevin Cullen, ABA Fires Back at Quayle View of a Lawyer Glut, Boston Globe, Feb. 3, 1992, at 3.

Individuals and groups supporting governmental flexibility might oppose the lobbying efforts of the private bar and public interest groups, but they are unlikely to mount concerted opposition. No one can be sure that fee shifting would result in a challenge to a particular governmental policy he or she favors. Some public interest groups, however, originally testified against the EAJA on the ground that it would dilute government enforcement efforts. See Award of Attorneys' Fees Against the Federal Government: Hearings on S. 265 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 2d Sess. 74-80 (1980) (testimony of Mary Frances Derfner on behalf of the American Civil Liberties Union and the Lawyers' Committee for Civil Rights Under Laws; id. at 83-87 (statement of Nan Aron, Director, Council for Public Interest Law). They soon changed their minds. See infra note 23.

The executive branch is likely to oppose one-way fee shifting statutes, however, since it stands to lose the most from their enactment. For example, the government opposed the attorney fee provision in the FOIA, arguing that it would lead to excessive litigation. See The Freedom of Information Act: Hearings on H.R. 5425 Before a Subcomm. of the House Comm. on Government Operations, 93d Cong., 1st Sess. 124-26 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, Department of Justice). Although the executive branch eventually accepted the Equal Access to Justice Act, it had previously argued for fee shifting only in more narrow circumstances. See, e.g., Hearings on S. 265, supra, at 39-40 (statement of Alice Daniel, Assistant Attorney General); see also supra note 2 (discussing the Reagan administration's opposition to fee shifting).

22 Although the evidence before Congress was largely anecdotal, Congress primarily wished to aid small businesses that lacked the means to challenge what they perceived to be arbitrary governmental conduct. The EAJA was appended to an act to aid small businesses in general. See, e.g., H.R. Rep. No. 1418, supra note 11, at 10 ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to

groups rallied behind the Act as well.[23] Similarly, consumer organizations have lobbied for fee shifting statutes against entities in the private sector.[24] After all, no companies willingly agree to one-way fee shifting provisions against themselves.[25]

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fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process."). See also 125 Cong. Rec. 21,435-36 (1979) (statements of Senator Culver and Senator Dole); Hearings on S. 265, supra note 21, at 102-03 (statement of James D. McKevitt, National Federation of Independent Business).

Small business groups successfully pushed for expansion of EAJA in 1985, Pub. L. No. 99-80, 99 Stat. 184 (codified as amended at 28 U.S.C. 2412 (1985)), to include litigation under the Contracts Disputes Act. See Equal Access to Justice Act Amendments: Hearing on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 43 (1985) (statement of Sally L. Douglas, Manager of Legislative Research, National Federation of Independent Business); id. at 49-50 (statement of David O. Stewart, representing Small Business United and Small Business Legal Defense Committee).

[23] See, e.g., Hearing on H.R. 2223, supra note 22, at 26-28 (testimony of Nan Aron, Director, Alliance for Justice). Fee shifting under the FOIA might similarly be explained by interest group politics. For instance, the ABA not surprisingly testified in support of the fee-shifting proposal. Freedom of Information, Executive Privilege, Secrecy in Government: Hearings Before the Subcomm. on Administrative Practice and Procedure and Separation of Powers of the Senate Comm. on the Judiciary and the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 93d Cong., 1st Sess. 152 (1973) (statement of John Miller, Chairman, Administrative Law Section).

[24] For instance, the ACLU supported the enactment of a one-way fee shifting provision in the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3708 (codified as amended at 12 U.S.C. § 3417(a)(4) (1988)). See Right to Financial Privacy Act, Hearings on S. 1343 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 2d Sess. 161, 174 (1976) (statement of Hope Eastman, Associate Director, ACLU National Office). The North American Securities Administrators Association opposed the measure. The Safe Banking Act of 1977, Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 95th Cong., 1st Sess. 24 (1977).

[25] Conceivably, private individuals or corporations could agree to such provisions as a type of good faith bond, signaling that they intend to honor contractual or fiduciary responsibilities. In exchange, the parties might be able to obtain a better price for services or generate good will over the long run. Or, the private party might agree to one-way fee shifting to encourage resolution of disputes through litigation rather than through alternative dispute resolution mechanisms. In the private sector, the incidence of such one-way fee shifting provisions is rare—apparently only consumers ever agree to one-way fee shifting schemes against themselves (e.g., with providers of medical and financial services), and the voluntariness of their decisions is open to question. See Donohue, supra note 9, at 1110 n.38 (explaining this phenomenon in the context of landlord-tenant relationships).

In California, many leases specify that the tenant must pay the landlord's legal fees if suit is brought against the tenant. Interestingly enough, under California law such efforts to shift fees unilaterally are held to be reciprocal contracts implementing a two-way fee shifting rule. International Indus. v. Olen, 577 P.2d 1031, 1033-34 (Cal. 1978).

In light of the Clinton administration's continuing reticence, Part I of this Essay examines the possible public policy justifications underlying Congress' one-way fee shifting mechanisms, concluding that Congress' departures from the American rule are normatively plausible.[26] First, Congress might adopt one-way fee shifting devices, whether automatic or based on the opposing party's fault, to minimize the cost of monitoring executive branch behavior. Congress may have control over whether to delegate authority to agencies, but it cannot exercise day-to-day supervision over those agencies. By encouraging litigation, one-way fee shifting indirectly allows Congress to monitor agency action. Litigation sheds light on bureaucratic practices and permits courts to act on Congress' behalf in overseeing agency action. The monitoring rationale also helps to explain Congress' enactment of one-way fee shifting statutes in the private sector—Congress can more easily superintend compliance with its mandates by providing private parties an incentive to contest others' failures to follow federal regulations. Private parties can thus share the enforcement burden and decrease the need for governmental oversight. This Essay will address in turn the incentive effects of both automatic one-way fee shifting and fee shifting based on a fault standard.

Second, fee shifting may also be an effective way for Congress to deter wrongdoing or, in other words, to improve the primary conduct of both the government and private firms. Both automatic and fault-based one-way fee shifting may force the executive branch and private firms to internalize more fully the costs of their misdeeds. The prospect of paying attorney fees may prompt agency officials to think twice before denying a meritorious claim or pursuing a questionable enforcement action. Similarly, one-way fee shifting may, at the margins, encourage private entities to comply with federal regulation in contexts in which executive enforcement is not practical.

Finally, Congress, through fee shifting, may wish to ensure more complete compensation for parties injured by government wrongdo-

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[26] In this Essay, I will address the possible public-regarding reasons underlying enactment of one-way fee shifting statutes. In so doing, I do not mean to suggest that Congress has actually been motivated by such concerns, though many members may well have been. Rather, I suggest only that public-regarding policy may support enactment of one-way fee shifting statutes. I will not focus in this Essay on the countervailing public choice explanation of enactment of one-way fee shifting statutes, though the commonality of interests among public interest groups such as the Sierra Club or the ACLU and the private bar representing government contractors does plausibly furnish part of the explanation for such statutes.

ing or by the failure of private entities to comply with governmental directives. Although the compensation goal has political appeal, fee shifting statutes reflect no consistent application of corrective justice principles—while many private parties injured by the wrongdoing of others cannot recover fees, others who are injured through no wrongdoing of their adversaries can obtain compensation for litigation expenses as well as for their underlying injuries.

Part II of this Essay examines the costs of one-way fee shifting. Overdeterrence is often touted as one such cost, but given that government agencies do not internalize the costs of fee awards fully, problems of overdeterrence are unlikely to materialize. Moreover, deferential standards of review create a safe harbor for agency officials, further cushioning the impact of a potential fee award. There is a greater chance of overdeterrence in the private sector, but to the extent the underlying liability standard incorporates a measure of wrongdoing, a socially harmful impact is less likely.

Nonetheless, the expense of administering one-way fee shifting statutes is significant, even if it is spread out among taxpayers or consumers. First, one-way fee shifting likely impedes settlement of the underlying dispute between the parties. The dispute over fees makes it less likely that the parties will amicably settle their differences on the merits. Second, because of the collateral litigation, litigants must at times pay not only the fees of private attorneys and judges, but in suits involving the federal government, the salaries of government attorneys and support staff as well. The costs increase with the number of litigable issues arising in the fee dispute.

In sum, one-way fee shifting should be pursued only after a context-specific evaluation of its possible benefits—added monitoring, deterrence, and increased compensation—as well as its possible costs, such as lost settlement opportunities and collateral litigation expense. Although one-way fee shifting is far from a panacea, shifting fees can be effective if used judiciously to encourage litigation over nonmonetary stakes or to discourage the government and large private firms from "picking on" smaller adversaries.

I. The Theoretical Case for One-Way Fee Shifting

Plausible justifications exist for legislative enactment of one-way fee shifting mechanisms. One-way fee shifting can help Congress monitor the activities of the executive branch, deter continued agency mis-

conduct, and provide more complete compensation for individuals and businesses injured by government wrongdoing. Similarly, one-way fee shifting against private firms may help coerce compliance with legislative directives as well as ensure greater compensation for those injured by private firms' failure to follow those requirements. Fee shifting is certainly not the most direct or efficient way for Congress to oversee agency activities and private conduct. But, in concert with other control mechanisms—private rights of action, report-and-wait provisions, oversight hearings, etc.—fee shifting statutes may well result in public benefit.

A. Monitoring Rationale

1. Agency Conduct

Congress routinely delegates vast authority to federal agencies. The extent of such delegations has often been decried,[27] and Congress could not conceivably supervise the exercise of this delegated authority, even if it were so inclined. Congress may of course conduct oversight hearings, authorize fact-finding studies or audits of agencies, informally approach agency personnel at the behest of constituents, and mandate that agencies file periodic reports. Given the expanse of the delegated authority, however, Congress cannot hope to oversee much of agency implementation efforts directly. Nevertheless, Congress, one hopes, wishes to ensure that the authority it delegates is exercised responsibly.

Congress has thus long relied upon judges and affected private parties to help rein in agencies' exercise of authority.[28] Congress has created private rights of action, such as under the FOIA, to permit suit in contexts likely to contribute to effective monitoring. The Administrative Procedure Act ("APA")[29] represents just the most prominent of numerous statutes designed to enlist private and judicial efforts for

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[27] See, e.g., Theodore J. Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power, 36 Am. U. L. Rev. 295, 296-99 (1987); Richard B. Stewart, Beyond Delegation Doctrine, 36 Am. U. L. Rev. 323, 329-31 (1987).

[28] Congress, of course, also enlists judges and private individuals to help oversee private parties' compliance with its regulatory directives as well. For instance, Congress has delegated authority to private individuals and groups to help police private sector activities. See Harold J. Krent, Fragmenting the Unitary Executive, 85 Nw. U. L. Rev. 62 (1990). Enactment of treble damage and qui tam actions serves comparable ends.

[29] 5 U.S.C. §§ 551-59, 701-06 (1988).

monitoring agency action. Other examples include provisions for employee challenges to adverse employment actions through the Federal Labor Relations Authority ("FLRA")[30] or the Merit Systems Protection Board ("MSPB"),[31] provisions for challenges by beneficiaries of entitlement programs for review of benefit decisions,[32] and provisions for challenges by private individuals to the environmental impact of governmental actions under the Clean Water Act of 1977.[33]

Authorizing judicial review may lead to effective monitoring in one of two ways. First, litigation sheds light on contested administrative practices and decisions, possibly bringing such practices to the attention of congressional oversight committees. Although some cases will settle, the controverted issue may be communicated to Congress if the settlement involves a sensitive issue or significant funds. Thus, encouraging suits facilitates a flow of information to Congress concerning administrative action.

Second, judges may act as congressional surrogates in ensuring that agency positions fall within the ambit set by Congress. Upon review, courts must determine whether the challenged agency position is consistent with any unambiguous congressional direction.[34] Obviously, Congress does not always make its delegations clear, whether by inadvertence or design,[35] but review by judges can and does ensure that

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30 5 U.S.C. §§ 7101-7135 (1988).

31 5 U.S.C. §§ 7701-7703 (1988).

32 See, e.g., Social Security Act, 42 U.S.C. § 405(b) (1988 & Supp. III 1992); Medicare Act, 42 U.S.C. § 1395ff(b) (1988).

33 33 U.S.C. § 1365(a) (1988). See also Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. § 9659(a) (1988).

34 Even under the doctrine of deference articulated in Chevron U.S.A., Inc. v. Natural Resources Def. Council, 467 U.S. 837 (1984), the courts must initially ascertain if the intent of Congress is plain, irrespective of the agency position. If Congress has not addressed the issue clearly, then courts must ask whether the agency position is reasonable, and if so, defer to the agency. *Chevron*, 467 U.S. at 843-44. As Justice Antonin Scalia noted, to the extent that judges find "more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws," *Chevron* constrains agency action significantly. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 521. See also Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969 (1992) (arguing that *Chevron*, contrary to public wisdom, has not expanded judicial deference to agencies).

35 See, e.g., Peter H. Aronson, Ernest Gellhorn & Glen O. Robinson, A Theory of Legislative Delegation, 68 Cornell L. Rev. 1 (1982) (arguing that Congress leaves some delegations vague because of its inability to agree on policy).

agencies act within Congress' broad mandate.[36] Increased judicial review may help Congress ensure that its programs (or deals) are followed faithfully. Thus, even though members of Congress may have many reasons to permit aggrieved parties to contest government action, one result is enhanced oversight of agency conduct.

a. Incentive to Litigate

Congress, quite reasonably, has determined that the market does not ensure sufficient incentives for litigation in a number of instances. Most individuals will bring suit only when they can expect to receive relief sufficient to compensate them for the expense and risk of litigation. Some injured parties, however, lack the resources to use litigation as a means to force their adversaries to provide compensation, particularly when their adversaries are much more adept at the litigation process. Moreover, litigation to enforce statutory and constitutional rights may benefit a wide swath of society, even when the stakes for any one individual are too small to prompt suit. Collective action problems make it unlikely that voluntary contributions will adequately fund an appropriate level of litigation in such contexts.[37] Affected individuals may therefore fail to initiate suits that not only benefit themselves, but benefit others as well.[38]

Congress could spur private suits against agency actions through any number of means. For instance, Congress could provide for treble or punitive damage awards as extra incentives, much as it has done in the private sector.[39] Such enhanced damage awards, however, not only may have an unwelcome impact on the fisc,[40] but also

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[36] Judges may also monitor administrative agencies by enforcing procedural regularity. Forcing agencies to articulate their positions with greater coherence and consistency may in turn help deter future arbitrary governance. For the deterrence function of fee shifting, see infra text accompanying notes 68-102.

[37] Percival & Miller, supra note 2, at 239.

[38] See id. at 237.

[39] See, e.g., the Clayton Act, 15 U.S.C. § 15(a) (Supp. III 1992); RICO, 18 U.S.C. § 1964(c) (1988). Congress could alternatively lower the plaintiff's burden of proof or take a wide array of other actions that would increase plaintiff's chance of prevailing.

[40] William Breit & Kenneth G. Elzinga, Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages, 17 J.L. & Econ. 329, 342 (1974) (arguing that treble damages overdeter in the context of antitrust enforcement); Arthur D. Austin, Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy, 1978 Duke L.J. 1353 (arguing that treble damage actions encourage filing of complaints in an attempt to

would not be effective in two critical contexts where encouragement of litigation against the government is most needed.

First, enhanced damage awards would not encourage suits for nonmonetary relief.[41] Treble damage awards obviously would not work in the FOIA context or for suits to set aside agency action under the APA. Punitive damage awards historically have been reserved for contexts in which at least nominal damages exist.[42] Second, enhanced damage awards would not contribute to increased monitoring when the government is the plaintiff. Governmental efforts to levy fines, recover for false claims, or restrain private conduct would not be affected by enhanced damage awards. Enhanced damage awards therefore have little potential to encourage litigation against the government in two of the contexts in which Congress might most desire help in monitoring—suits for nonmonetary relief and defense against government-initiated actions.

In contrast to enhanced damages, Congress' use of one-way fee shifting may more successfully encourage affected individuals to challenge governmental actions. Unlike enhanced damage awards, fee shifting should encourage private parties who are sued by the government to challenge vigorously government policy. Targets of government enforcement must decide how many resources to devote to defending against governmental enforcement efforts. Such private parties might need less encouragement than plaintiffs challenging government policy since they have already been singled out as targets for enforcement. The prospect of recovering attorney fees should nonetheless instill individuals and businesses with even greater resolve to contest what they believe to be government overreaching, particularly because these defendants cannot obtain counsel through contingency fee arrangements.

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intimidate defendants to modify their behavior in a way that benefits plaintiffs' narrow competitive interests).

[41] Enhanced damage awards are likely to be only slightly more effective if the amount of money at stake in the litigation is low. In the benefits context, for instance, a claimant suing for $1000 in back disability benefits may not find an attorney even if a successful award would be trebled. Similarly, enhanced damage awards might not materially affect plaintiffs' ability to find representation if all that is at stake is a $500 tort suit. Nonetheless, as the amount of the claim increases, the possibility of treble damages should encourage suit quite dramatically, and if a punitive damage award were possible, then the prospect of suit would increase even more.

[42] James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic that has Outlived its Origins, 37 Vand. L. Rev. 1117, 1145 (1984).

In addition, one-way fee shifting should afford private parties an incentive to bring claims that are not readily monetizable.[43] Parties with strong claims can use the prospect of the fee award to attract counsel to represent them. In particular, public interest groups benefit from fee shifting[44] because, when little material recovery is possible, there rarely is sufficient incentive for any one plaintiff to expend its own resources on behalf of the public.[45] The availability of fees thus makes litigation more likely, at least for parties lacking a well-stocked war chest. Many challenges to environmental threats, for instance, might not be brought but for the possibility of fee shifting.[46]

Furthermore, the prospect of attorney fees should encourage small, strong monetary claims, perhaps even more effectively than would enhanced damage awards. Because of the costs of litigation, private parties may not sue if only a modest amount of money is at stake even when they have a substantial chance of winning. The smaller the claim, the greater the percentage of ultimate recovery firms or individuals need to expend on attorney fees. A contingency fee arrangement may not ensure adequate counsel in such contexts[47] and will not be available when the government is the moving party.[48]

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[43] According to one empirical study, challenges by only three agencies—the Merit Systems Protection Board, the National Labor Relations Board, and the Immigration and Naturalization Service—constitute the majority of all suits filed to review administrative action. Peter H. Schuck & E. Donald Elliott, To The *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 993 n.31. Such suits rarely include monetary claims.

[44] Ironically, some public interest groups like the ACLU originally opposed the Equal Access to Justice Act on the ground that it might impede governmental regulatory efforts. However, as evidence of the EAJA's utilization by public interest groups grew, such groups began to support the Act. See supra note 23.

[45] Congress can, of course, provide more direct incentives for individuals to bring suit to redress injuries suffered by the public at large by authorizing such individuals to seek fines on behalf of the public and share with the government any recovery. See, e.g., 31 U.S.C. § 3730 (1988 & Supp. III 1992) (providing for qui tam actions under the False Claims Act).

[46] Nonetheless, fee shifting will induce relatively few such cases to be brought. The prospect of fees is too uncertain to provide incentive to sue unless accompanied by other incentives such as funding through grants, pro bono policies at firms, or attorney preference.

[47] For instance, consider a suit brought under the Truth in Lending Act to contest a department store's failure to itemize finance charges in its credit plan, where damages available are likely to be minimal. See S. Rep. 94-589, 94th Cong., 2d Sess. 24 (1976) (additional views of Senator Garn).

[48] In contrast to one-way fee shifting, two-way fee shifting is unlikely to encourage suit in the three contexts discussed (small monetary claims, nonmonetary claims, and government initiated suits). Small businesses with modest claims against the government, for instance, may well be too risk-averse to bring suit, recognizing that failure to prevail will result not only in

Consider the situation of a claimant with a $10,000 claim against the United States. That claim might not be brought—even if the private plaintiff estimated an eighty percent chance of success—if the plaintiff's attorney fees could be expected to reach $8000.[49] On the other hand, with one-way fee shifting, claims will be brought even if the fees exceed $8000 as long as there is a significant chance that the fees will be shifted to the government under the Act. A risk-neutral party might not bring suit if it believed it had a negligible chance to collect attorney fees, but it likely would if it stood a fifty percent chance of recovering its own fees.[50]

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payment of their own attorney fees, but those of the government as well. Similarly, a taxpayer may not wish to challenge a fine or the environmental impact of a government construction project if he or she might be saddled with payment of two sets of attorney fees. Two-way fee shifting deters suit over modest financial stakes and nonmonetary relief, unless the prospect of victory is almost certain. Congress has comparatively rarely enacted symmetrical two-way fee shifting statutes in the private sector, and only then generally to govern litigation between parties of approximately equal strength. See, e.g, Copyright Act, 17 U.S.C. § 505 (1988); Trademark Act, 15 U.S.C. § 1117 (1988); Patent Infringement Act, 35 U.S.C. § 285 (1988); Real Estate Settlement Act, 12 U.S.C. § 2607(d)(5) (1988).

[49] Plaintiffs still might bring such claims if they believe that bluffing could result in settlement of the case. See generally John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of the Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 700-04 (1986). That bluffing strategy is not likely to work against the government, however, since it is a repeat player and does not fully internalize its litigation costs.

[50] This is not to ignore the fact that many private parties who litigate against the United States would in all likelihood contest government action just as vigorously whether or not the prospect of an enhanced damage award existed or if their attorney fees would be reimbursed. If the recovery could be significant, or if compliance with a governmental regulation would put the private party to great expense, then fee shifting would not be needed to spur suit, unless the party has no assets. Companies would likely have incentive to challenge substantial fines levied under OSHA or penalties levied by the IRS whether or not they were eligible for fee shifting. Similarly, most contract claims before agency boards of contract appeals would be brought irrespective of the EAJA. Even if the private party could not afford counsel at prevailing rates, it might well be able to attract counsel to pursue a monetary claim through a contingency fee arrangement. For instance, private parties seeking social security disability benefits may contract with counsel for up to 25% of the back benefits sought, 42 U.S.C. § 406(b) (1988), and thus most individuals with substantial claims can find competent counsel.

Even for nonmonetary controversies, there still may be adequate incentive for private parties to contest the governmental action. A private company may need to exonerate itself from a charge of violating a health regulation to maintain its good name and status in the business community. Or, the principle at stake—such as allowing a union to campaign on company property—may be of such obvious import to a company that the lack of money would not be an obstacle to challenging the governmental action. Nonetheless, fee shifting unquestionably promotes suit in a substantial number of cases, particularly in contexts that Congress might well want to encourage. See supra text accompanying notes 41-48.

Some, however, might consider one-way fee shifting inefficient precisely because it encourages plaintiffs to bring small claims that are comparatively expensive to litigate. In the previous example, a private party might have the incentive to devote more than $10,000 of fees to the case. In other words, like the prospect of treble or punitive damage awards, fee shifting removes what might be considered an appropriate market constraint on litigation.

The prospect of excessive litigation over small claims, however, is not necessarily a reason to abandon one-way fee shifting. The incentive to litigate small claims aggressively may prove beneficial to the system as a whole. Fee shifting enables a plaintiff to extract more from a recalcitrant defendant, and such defendants will more likely settle future small claims expeditiously. Fee shifting may reduce the government's ability to intimidate small parties from challenging governmental action by encouraging a reputation for overlitigating cases.[51] Moreover, there may be positive external effects from litigation over small monetary claims, as well as over nonmonetizeable claims such as injunctions. For example, one contractor's successful suit against the government over a nominal sum may benefit many contractors and, if the government prevails, it may gain an advantage in many of its dealings with contractors. Thus, increasing the number of small claims filed will not necessarily result in socially wasteful litigation.[52]

Yet for one-way fee shifting statutes to induce private parties to challenge governmental action, the private parties must be assured ex

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[51] See Thomas D. Rowe, Jr., The Supreme Court on Attorney Fee Awards, 1985 & 1986 Terms: Economics, Ethics & Ex Ante Analysis, 1 Geo. J. Legal Ethics 621, 624-25 (1988). Fee shifting might similarly deter insurance companies from seeking a reputation for overlitigating cases. See Coffee, supra note 49, at 713.

[52] Not surprisingly, one-way fee shifting statutes are unlikely to promote nuisance litigation, at least in the public sector. Nuisance litigation cannot arise when the government initiates suit, and in contrast to insurance companies or other repeat players in the private sector, the government as a defendant will not likely settle weak cases for their nuisance value. The government has less incentive to settle than do such private parties because of political considerations against giving windfalls to undeserving claimants, and because the government does not consider litigation costs as fully. See supra note 49. Moreover, counsel may not recover market rate fees even if successful. For instance, under the EAJA and the tax fee shifting statute, counsel cannot recover more than $75 per hour plus a cost-of-living increase. 28 U.S.C. § 2412 (d)(2)(A) (1988); 26 U.S.C. § 7430 (c)(1)(B)(iii) (1988). Furthermore, the need to surmount the substantial justification standard also stands as a disincentive to frivolous litigation. See supra note 19.

ante that they are likely to be able to collect fees. Under the tax statute and the EAJA, private parties must not only assess the strength of their claims against the United States, but also gauge whether courts on review will find that the government's position had been substantially justified. Other one-way fee shifting statutes similarly condition recovery on a showing of government fault.[53] Risk-averse parties may rightly conjecture that, except in cases in which the probability of prevailing is quite high, they have little chance of recovering fees. Nonetheless, the availability of fees in some cases—even if unexpected—provides public interest lawyers greater resources to fund other litigation. In other words, even the tax statute and the EAJA to a limited extent subsidize public interest attorneys, enabling them to conduct more litigation.[54]

In short, on a theoretical level, fee shifting statutes furnish some incentive for private parties to contest governmental action where modest sums of money or nonmonetizable issues are at stake, particularly when the chance of success on the claims is substantial. Small businesses and public interest groups are marginally more likely to contest governmental regulation if the prospect of fee shifting exists,[55] and fee shifting is likely more successful than other potential mechanisms such as enhanced damage awards. Empirical support for those hypotheses, however, has not been collected,[56] although there is weak

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[53] See, e.g., Back Pay Act, 5 U.S.C. § 7701(g) (1988) (providing for fee shifting when "warranted in the interest of justice," which includes consideration of agency fault). Under the FOIA, 5 U.S.C. § 552(a)(4)(E) (1988), courts have construed fee provisions to shift fees only when prevailing parties are "entitled" to fees, which includes consideration of the reasonableness of the agency's conduct. See Weisberg v. Department of Justice, 745 F.2d 1476, 1495 (D.C. Cir. 1984) (discussing standards for award of attorney fees under the FOIA).

[54] Whether fee shifting statutes are efficient subsidies poses a difficult question beyond the scope of this Essay. As opposed to direct subsidies to legal aid offices, fee shifting directs subsidies only to those public interest groups that have achieved the greatest success in litigation. Cf. Dan B. Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 Duke L.J. 435, 449 (arguing that the courts have used fee shifting to support certain groups).

[55] Groups qualifying for tax exempt status under 26 U.S.C. § 501(c)(3) (1988) cannot, however, choose to pursue litigation merely because of the potential for a monetary award. See Rev. Proc. 92-59, 1992-2 C.B. 411; Rev. Proc. 75-13, 1975-1 C.B. 662.

[56] Professors Schwab and Eisenberg have attempted to gauge whether passage of the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. § 1988 (Supp. III 1992), served as a significant incentive for parties to bring more civil rights actions. They conclude, based on a representative study of filing rates, "that attorney fees play a lesser role in civil rights litigation than one might expect." Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional

evidence showing some correlation between fee shifting and the incidence of suit.[57] Isolating the effect of fee shifting on litigation volume is difficult because counsel may agree to bring lawsuits against the government on behalf of their clients for a wide variety of nonmonetary reasons, such as client development, more interesting cases, or pro bono policies. And the number of lawsuits may increase or decline due to a change in governmental policy, irrespective of fee shifting.

b. Signaling Effect

Fee shifting might facilitate congressional monitoring in another respect by helping to signal to Congress that an agency or division is engaging in systematic misconduct. Two of the most prominent fee

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Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 755 (1988).

It is quite difficult to determine empirically whether one-way fee shifting statutes have encouraged more suits to be filed. To gauge the impact of the EAJA, one would need at least to determine whether more suits were filed against the government after 1980 than before. The data collected by the Administrative Office of the United States Courts are not specific enough to allow any reasonable inferences. From 1977 to 1978, for instance, the number of civil cases filed against the federal government increased 16%, and then another 19% the following year. After passage of the EAJA, the rate of increase in civil cases involving the government did not materially differ. Similarly, the number of government contracts cases that were filed by private parties actually decreased after passage of the Act—more cases were filed in 1977 than in 1987 even though the number of civil cases filed against the government doubled. See, for each year from 1977 through 1987, the Annual Report of the Director of the Administrative Office of the United States Courts (Table C-3).

[57] For instance, the fee shifting provision in the FOIA was enacted in 1974. For the years between 1967-72, only 200 FOIA cases were filed. In 1977 alone, 142 cases were filed. Mark H. Grunewald, Freedom of Information Act Dispute Resolution, 40 Admin. L. Rev. 1, 7 n.40 (1988). Although pinpointing the effect of the attorney fee provision is impossible, it likely had some effect, even though the liberalization of the FOIA in 1974 played a predominant role.

Similarly, fee shifting probably played some role in encouraging law suits by disappointed social security claimants after the EAJA was enacted in 1980. Although the number of court challenges actually declined from 1979-80, there was over an 8% increase in 1981, and then over a 30% increase the year after. See, for each year from 1979 through 1984, the Annual Report of the Director of the Administrative Office of the United States Courts (Table C-3). Thereafter, the numbers increase, but those increases are likely directly attributable to the government's aggressive policy of forcing beneficiaries off the social security rolls. See, e.g., Schweiker v. Chilicky, 487 U.S. 412, 414-17 (1988) (discussing termination of benefits under "continuing disability review" program initiated in 1981). Moreover, the percentage of administrative hearings involving claimants represented by attorneys, which had ranged between 36% and 42% between 1974-1979, grew to 50% by 1981. See Social Security Administration, Office of Hearings and Appeals, Workload Statistics, Requests for Hearings (on file with the Virginia Law Review Association).

shifting provisions—the tax statute and the EAJA—predicate fee awards on the government's inability to demonstrate that its position had been substantially justified.[58] Other statutes condition fees on a showing of government wrongdoing as well.[59] An award of fees in such contexts, therefore, reflects government misconduct. A string of adverse fee decisions against a particular agency should alert Congress that something is amiss with that agency's implementation policies. The collateral fee determination allows Congress to glean more information than it could solely from an enhanced damage award.[60]

In contrast, Congress is presumably less concerned with the "wrongfulness" of conduct in the private sector. Congress is interested in monitoring the private sector's compliance with regulatory commands, irrespective of the reasonableness of the private party's conduct, unless the regulatory commands proscribe only unreasonable behavior. The prevalence of automatic fee shifting provisions in the private sector can in part be explained by Congress' lack of interest in calibrating the regulatory violations of private entities.

The information Congress can glean from fee awards based on fault standards, however, is unlikely to lead to effective monitoring even of agencies. The circumstances underlying each fee award are apt to differ so markedly as to make any generalizations unreliable. Moreover, a signaling function can only operate if there is sufficient information available to the watchdog. There may be too few fee requests and awards involving particular agencies to permit Congress to draw any meaningful conclusions.[61] Thus, even if congressional overseers

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[58] See supra note 19.

[59] See supra note 53.

[60] In that respect, the collateral fee determination is similar to punitive damage awards, which also convey more information to Congress than would a mere finding of liability.

[61] In the EAJA context, for instance, only the Department of Health and Human Services has a significant enough EAJA caseload (approximately 2000 cases a year) from which any conclusions can be drawn. See Harold J. Krent, Fee Shifting Under the EAJA—A Qualified Success, 11 Yale L. & Pol'y Rev. __ (forthcoming 1993). In fiscal year 1990, the Department of the Interior was the second most active agency in court EAJA cases, losing five out of the seven fee disputes resolved. See Annual Report of the Director of Administrative Office of the United States Courts 1990, at 36-37 (Table 25). The Armed Services Board of Contract Appeals, which granted 13 applications in the last fiscal year, had the most active agency EAJA caseload. See Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act (Oct. 1, 1988-Sept. 30, 1989); id. (Oct. 1, 1989-Sept. 30, 1990). Similarly, there were only 13 fee claims arising out of FOIA suits in 1990. FOIA Annual Guidebook. Such data, particularly because of the unique fact patterns among the cases, provide little grist for any oversight committee or agency.

would consider fee awards as a barometer of agency performance, there is inadequate information upon which they could make any judgment.

2. *Private Firms' Compliance with Regulation*

One-way fee shifting in the private sector may also serve to improve monitoring and detection of wrongdoing. By providing one-way fee shifting mechanisms, Congress may wish to encourage suit to help it oversee the conduct of large entities whose activities otherwise might not come to light. Congress has enacted one-way fee shifting statutes to help promote fidelity to federal regulatory or statutory requirements, not to rectify private wrongs. Although Congress relies to a great extent on agency enforcement of federal standards of conduct, it cannot devote the resources needed to allow enforcement agencies to investigate every instance of credit fraud or improper discharge.[62] Fee shifting may encourage litigation as a proxy for such agency investigations.

In the absence of fee shifting, small parties may lack the resources to contest overreaching by large firms, particularly if the amount at stake is small or involves nonpecuniary loss. No single individual injured by unlawful conduct may have the incentive to challenge that conduct, even though many others may have been injured as well. Consequently, firms may transgress congressional regulation without fear of exposure and penalties. Fee shifting helps to overcome the disincentive to sue in such contexts. In addition, fee shifting may encourage entrepreneurial attorneys to detect wrongdoing by such firms and to find clients to pursue a case, further aiding congressional policy goals through litigation.

Although Congress has left the American rule intact in most cases, a pattern emerges from the fifty or so one-way fee shifting statutes it has enacted to govern private lawsuits. Most provide fees for prevailing consumers contesting the market practices of large entities. For instance, individuals challenging the improper disclosure of informa-

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[62] From a monitoring perspective, fee shifting is not effective if private enforcement tends to piggyback on federal enforcement efforts, as at times is the case in antitrust enforcement. Breit & Elzinga, supra note 40, at 351. But much private enforcement occurs independently of federal regulatory enforcement. See, e.g., Truth in Lending Act, 15 U.S.C. § 1640 (1988); National Mobile Home Construction & Safety Act of 1974, 42 U.S.C. § 5412(b) (1988); Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 1918(a) (1988).

tion by financial institutions[63] or improper charges by creditors[64] can, if successful, recover their attorney fees.

One-way fee shifting in the private sector thus stems from some of the same concerns underlying one-way fee shifting against the federal government. As under the FOIA or MSPB, for instance, the amount at stake is not likely to be large nor the issue in dispute (e.g. privacy) readily monetizable, even though large numbers of consumers may be adversely affected by defendant's conduct. Individuals who lack significant means are thus unlikely to be able to find counsel to challenge the improper credit payment term or improper employment action,[65] even though others may have been injured as well by the failure to follow federal regulation. Moreover, there is an imbalance of resources between plaintiffs and defendants in this group of cases, just as there often is between private parties and the government; one-way fee shifting may help ensure that plaintiffs would not lose merely because they lack litigation resources.

Fee shifting therefore plays a supplemental role in a system of command-and-control regulation.[66] As long as such centralized regulation exists, fee shifting serves as a means of encouraging private parties to help enforce federal regulatory requirements, particularly where government enforcement might prove inefficient.

Congress, of course, recognizes that a private party's interest in litigating against the executive branch or private firms often diverges from its own. Private parties may seek only monetary benefit, or they may seize upon litigation to further their political interests. The views

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[63] Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a) (1988); Wire Interception and Interception of Oral Communication Act of 1968, 18 U.S.C. § 2520 (1988); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2707 (1988).

[64] Truth in Lending Act, 15 U.S.C. § 1640(a) (1988); Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d) (1988); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a) (1988).

[65] Surface Transportation Assistance Act of 1982, 49 U.S.C. app. § 2305(c)(2)(B) (1988); Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (1988). If significant backpay is at stake, then fee shifting may be less critical. Moreover, in some private sector suits in which damages are available, Congress has provided for treble damage or punitive damage awards, which should obviate the need for fee shifting. For whatever reason, Congress has at times provided for both treble damages and recovery of attorney fees. See, e.g., The Clayton Act, 15 U.S.C. § 15(a) (1988 & Supp. III 1992); Bank Holding Company Act, 12 U.S.C. § 1975 (1988).

[66] See, e.g., Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. Econ. & Organization 59, 72-73 (1992) (addressing role of private parties in implementing legislative directives in the environmental context).

of Congress per se are not represented in the litigation, as it has no control over the litigants' conduct.[67] Nonetheless, Congress may determine that the private party serves as a rough surrogate for itself in checking that agencies fulfill their statutory mandate or that private firms toe the regulatory line. Congress may part with oversight authority because it lacks more direct options for checking executive branch and private firm conduct. To a limited extent, therefore, fee shifting may lead to more effective monitoring of agency action and private firm conduct by encouraging more lawsuits.

B. Deterrence of Wrongdoing by Both Public and Private Actors

Enactment of one-way fee shifting provisions might not only facilitate monitoring of agency action and private firms' compliance with federal regulation, it might also help deter wrongdoing by agencies and private firms in the first place. Deterrence might stem from increased judicial oversight, from partial elimination of the advantage in litigation enjoyed by the government and large private entities, or from the internalization of fee awards. If the government or a large private party must pay attorney fees when it loses litigation, then it might use more care in the future in pursuing actions affecting the interests of its adversaries or in deciding to litigate. The efficacy of fee shifting in encouraging due care hinges on a great number of contextual factors, particularly whether the private or public entity closely monitors its exposure to litigation costs before deciding on a particular course of action.

1. Need for Deterrence

One-way fee shifting statutes are partially grounded on the congressional perception that the political process inadequately deters government actors from misconduct and that market forces insufficiently deter private entities. I doubt that anyone would challenge the underlying premise that wrongdoing exists in both the private and public sectors. Furthermore, few would assert that the political process or market forces adequately prevent wrongdoing by public and private entities.

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[67] In part because of that feared loss of control, private entities have not willingly encouraged lawsuits against themselves, even if additional monitoring of a subsidiary, for example, would be beneficial.

The additional check of fee shifting in the private sector may well be needed to enforce compliance with government objectives. The political process does not temper the conduct of corporate officials, and shareholders may have insufficient incentive to oversee their firms' adherence to costly regulatory programs. Indeed, market forces may exacerbate, instead of counteract, firms' failure to comply with regulatory requirements—firms have the incentive to skimp on compliance to gain a competitive edge in the marketplace. Congress therefore has encouraged suit through one-way fee shifting particularly when the prospect of successful governmental enforcement is low.[68]

In the public sector, on the other hand, significant political checks and judicial review safeguard the content of government policy making and application of that policy to particular circumstances. For instance, government agencies generally act only after considerable internal debate and after interested private parties have a chance to influence the process. Environmental policy regulating toxic waste dumps is usually set through notice-and-comment rule making, which gives agency staff and affected parties the opportunity to mold the eventual policy selected.[69] Rule making is then subject to challenge through judicial review. Even in the absence of notice-and-comment rule making, agency policy is formulated only after considerable discussion and frequently after affording interested private parties an informal opportunity to contribute to the debate. In addition, congressional committees may well learn of key policy initiatives before they are implemented; if Congress determines that an agency has selected an unwise policy, it has the tools to force the agency, either directly or indirectly, to change such policy. Congress remains at least somewhat accountable to the electorate for the regulatory actions of its delegates.[70]

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[68] See supra text accompanying notes 62-65.

[69] See, e.g., 42 U.S.C. § 7410 (1988 & Supp. III 1992).

[70] That accountability, however, is admittedly attenuated, which is one reason why commentators have roundly condemned broad delegations of congressional authority to agencies. See, e.g., John H. Ely, Democracy and Distrust 130-34 (1980); Theodore J. Lowi, The End of Liberalism: The Second Republic of the United States 92-107 (2d ed. 1979); Aronson et al., supra note 35, at 21-37. For a general defense of political checks on agency decision making, see Mark Seidenfeld, A Civic Republican Justification for the Bureaucratic State, 105 Harv. L. Rev. 1512 (1992).

Similarly, government officials implementing previously set policy are subject to political checks, though the checks are not likely to be as effective as those confronting agency policymakers.[71] Such government officials must determine how to apply broad policy set by Congress or other agency officials. In contrast to officials making policy choices, officials implementing policy in fact-specific contexts generally act without the benefit of public participation. Moreover, Congress is rarely aware of fact-specific application of policy unless an agency targets an influential constituent. Some enforcement decisions, however, are prefaced by considerable debate or at least examination within the agency,[72] and generally only relatively senior agency officials have the authority to approve significant affirmative litigation.[73] Agencies have also placed controls on officials making benefit determinations to ensure as much consistency as possible.[74] Even before judicial review, therefore, the political process to some extent molds executive implementation decisions as well as policy making itself, and the prospect of judicial review serves as an ex ante check on agency conduct.[75]

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[71] The distinction between formulation of policy and implementation of policy is of course elusive. "Policy" suggests a rule or practice of general applicability, preceded by deliberation, which is intended to set a model or guide for future conduct. In contrast, implementation of policy or case-specific governmental action involves application of set policy to particular facts, with no necessary precedential effect.

[72] There are checks within the agency in the benefits context as well. See Mathews v. Eldridge, 424 U.S. 319, 335-39 (1976) (describing the process by which determinations to terminate disability benefits are reached); see also 20 C.F.R. §§ 404.900-404.906 (1993) (detailing steps in Social Security Act benefits decision making).

[73] For instance, claims for over $500,000 filed under the False Claims Act cannot be delegated to U.S. Attorneys, but instead must be handled directly by the Civil Division under the jurisdiction of the Assistant Attorney General. 28 C.F.R. Pt. O, Subpt. Y, App. § 4 (1993). The General Counsel of the Securities and Exchange Commission must review all enforcement cases prior to suit. 17 C.F.R. § 200.21 (1992).

[74] The Social Security Administration ("SSA") in the 1980s attempted to exercise greater control over decision making by administrative law judges ("ALJ") by demanding greater productivity from each judge and attempting to achieve more consistent results. The SSA instituted a peer review program whereby SSA's Appeals Council reviewed certain ALJ determinations on its own motion. The SSA's efforts engendered considerable controversy. See generally Richard J. Pierce, Jr., Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from *Chevron* and *Mistretta*, 57 U. Chi. L. Rev. 481 (1990).

[75] My point is not that these political checks provide optimal deterrence, only that such checks do not operate in the private sector. The prospect of government regulation does constrain private decision making to a certain extent. Corporate managers recognize that any misstep that results in public indignation may induce government regulators to act. But the

Despite Congress' greater control over government agencies than over private parties, Congress might still conclude that additional checks upon agency conduct would be beneficial. The costs of wrongdoing in the public sector context may be greater than in the private sector, both because of political demoralization and because of the broader impact of some governmental action. In addition, many governmental actions such as administration of entitlement programs do not have direct counterparts in the private sector. Furthermore, Congress might not trust political process checks, particularly when agency action is not preceded by open debate. In short, Congress could reasonably determine that, even if some government actions are checked considerably by the political process and the prospect of judicial review, fee shifting would add a significant constraint in contexts in which government actors are subject to relatively few other restraints. Thus, Congress may enact one-way fee shifting statutes as a means to deter wrongdoing in both the private and public sectors.

2. *Deterrence from Increased Judicial Review*

Only limited deterrence, however, can be expected to arise from fee shifting's inducement to private parties to contest governmental and private conduct. Even in the absence of one-way fee shifting, government and private sector decisonmakers recognize the potential for suit and external review.[76] Indeed, given our litigious culture, it would be surprising if a government policymaker did not anticipate that somewhere down the line every policy could be challenged in a lawsuit. Targets of enforcement action or disappointed benefits claimants often seek review of the relevant government determinations either within the agency or in courts.[77] And private businesses anticipate that a certain percentage of former employees or consumers will sue. To be sure, some actions might not be challenged in the absence of fee shifting, and some enforcement decisions might not be as vigorously contested; but because decisionmakers do not know which decisions will be challenged, they must consider the possibility of a lawsuit in

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force of that check is uncertain since the government is likely to intervene only in particularly egregious contexts.

[76] Accordingly, enhanced damage awards would be even less effective deterrents in this respect.

[77] The vast majority of suits seeking review of agency action arise in the enforcement context. Shuck & Elliott, supra note 43, at 1013-14.

every case. The extra inducement of litigation provided by fee shifting statutes, therefore, is unlikely to serve as a substantial ex ante check upon government or private decisionmakers.

Fee shifting, however, might deter government or private actors by subjecting more actions to judicial review. To the extent that each instance in which judges determine that wrongdoing exists deters future wrongdoing, fee shifting might thus have a marginal impact. By encouraging lawsuits, therefore, fee shifting serves not as an ex ante but as an ex post check on agency and private conduct, facilitating the deterrence provided by judicial review.

Not only may fee shifting increase the number of challenges filed, but it also may make those challenges more effective by minimizing the advantage that government and large private firms often have in litigating against smaller entities. Large parties usually have more litigation resources than their smaller adversaries,[78] and the smaller parties, unaided by fee shifting, may not be able to afford protracted litigation. For instance, a consumer might not contest a finance charge imposed by a firm in the absence of one-way fee shifting. The firm might prevail solely due to its size. Not only would that result be unfair, it could have external effects as well because many other consumers might have gained from a determination that the firm erred in imposing the finance charge. In other words, the aggregate social benefit in litigation may not be reflected in the stake of one particular litigant. Especially if, as the evidence shows, small parties tend to be risk averse,[79] some meritorious claims will not be brought against the government and large private parties, and some issues will not be fully aired, merely because of the expected litigation costs.[80]

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[78] Congress has generally enacted one-way fee shifting statutes in the private sector only when there is an imbalance of resources among the parties. See, e.g., Truth in Lending Act, 5 U.S.C. § 1640(a) (1988) (regulating transactions between institutional creditors and consumer obligors). See also supra text accompanying notes 63-66.

[79] Rowe, supra note 8, at 142.

[80] This relationship can be expressed algebraically: where p = the plaintiff's expectation of prevailing, a = plaintiff's legal fees, and x = plaintiff's estimate of judgment, then suit will be brought only when $px > a$. With one-way fee shifting, however, plaintiff would bring suit where $px > (1-p)a$, since there is a substantial likelihood that the government will have to pick up the tab for the attorney fees. Under the EAJA and other fee shifting statutes based on an independent determination of fault, $(1-p)a$ must be redefined as $(1-r)a$, where r is plaintiff's expectation of prevailing in the fee litigation.

The extent to which the government or large private entities actually benefit from their size advantage is not clear. Many government attorneys are overworked and therefore devote considerably less time to individual cases than do private counsel. On any given case, there may be one government attorney against several associates and a partner in a law firm. In some cases in the private sector, plaintiffs of modest means may be able to retain specialized counsel through contingency fee arrangements or expert counsel through legal service plans. Nonetheless, other private parties plainly cannot afford to litigate in the same style as the government or large firms in the private sector. Fee shifting is likely to have a modest impact, therefore, in ensuring that the government or large private firms not prevail in litigation merely because of their size. That effect might slightly deter wrongdoing by signaling that government and other large actors cannot get away with "picking on" smaller adversaries.[81]

3. *Deterrence Arising from the Attorney Fee Award*

Alternatively, Congress might plausibly determine that fee shifting would deter government and large private actors from wrongdoing because it would force them to internalize the cost of their actions more fully. Just as with damage awards generally, fee shifting statutes provide agency and corporate officials more incentive to steer clear of conduct that could lead to adverse awards. Conceivably, by forcing the government and large private parties to internalize the costs of their actions more fully, fee shifting statutes may influence how they fashion policy, implement policy, or conduct litigation.

Policymakers, however, rarely consider the possibility of attorney fees when formulating positions.[82] It is ludicrous to think that offi-

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[81] Agency officials might use the government's size advantage in litigation not only to deter future challenges to government action, but also to pad their enforcement record. In hearings leading to enactment of the EAJA, proprietors of small businesses testified that enforcement officials selected their companies for adverse action merely because of their size. In part, Congress hoped that fee shifting would deter such agency behavior. See, e.g., H.R. Rep. No. 1418, supra note 11, at 10 ("In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decisionmaking process.").

[82] Executive agencies must nonetheless present proposed rules to the Office of Management and Budget for review in part to ensure that agencies have undertaken cost-benefit analyses in proposing the rules. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), *reprinted in* 5 U.S.C. § 601 (1988). See generally Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533 (1989).

cials at the National Highway Traffic Safety Administration ("NHTSA") or the Environmental Protection Agency ("EPA") consider the potential financial impact from an adverse attorney fee award in setting seatbelt policy or effluent standards, any more than Congress would consider litigation costs in enacting broad social policy. Similarly, oil company managers probably do not consider potential attorney fee liability in setting transportation policy or delivery schedules. An attorney fee award is likely to be trivial, or at least quite modest, in comparison to the financial and social goals to be advanced by governmentwide policy or broad policies set by private entities.[83] Particularly if the government or private party is already exposed to damage awards, the prospect of paying attorney fees in addition is not that daunting. For instance, car manufacturers are unlikely to consider the potential for attorney fee awards in designing their fleets given the potential for staggering damage awards. Likewise, attorney fee awards in treble damage actions[84] or in tort suits[85] would not add materially to deterrence.

Indeed, given the separation in most agencies between policymakers and litigators, consideration of possible attorney fee awards is not likely to be of significant moment to policymakers. For instance, in setting car safety standards, NHTSA must recognize the possibility of a legal challenge, but it also recognizes that the Department of Justice

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[83] Moreover, under the EAJA and tax statute, the prospect of fee shifting is even slimmer. Few government officials consider it likely that their policy will be set aside upon judicial review, let alone that it could be considered ex post to be unreasonable. In addition, few government policymakers are aware of whether successful challengers to government policy would qualify under the eligibility standards in the EAJA and tax statute. Cf. 28 U.S.C. § 2412 (1988); 26 U.S.C. § 7430 (1988).

[84] See, e.g., The Clayton Act, 15 U.S.C. § 15 (1988 & Supp. III 1992). Availability of enhanced damage awards might cause more deterrence. Congress to my knowledge has never allowed such damages, specifically precluding punitive damages even under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2674 (1988).

[85] In the private sector, fees cannot generally be recovered by prevailing tort plaintiffs, though some have suggested that juries often inflate damages to account for contingency fee arrangements. Molly Selvin & Larry Picus, The Debate Over Jury Performance: Observations From a Recent Asbestosis Case 38-39, 55, 74 (1987); Jane Goodman, Edith Greene & Elizabeth F. Loftus, Runaway Verdicts or Reasoned Determinations: Mock Juror Strategies in Awarding Damages, 29 Jurimetrics J. 285, 301-04 (1987). Under the FTCA, attorneys are entitled to an award not to exceed 25% of recovery or 20% of an administrative settlement, but those fees come not from the government but from the client. 28 U.S.C. § 2678 (1988).

will handle the litigation at no charge to the client agency.[86] Similarly, independent counsel pursuing investigations under the Ethics in Government Act[87] realize that any fees ultimately paid to the target of their investigations will not affect their budgets.

This is not to suggest that agency policymakers are not aware that litigation costs the government money, only that full internalization is unlikely given that the current costs of litigation are not even quantified, let alone deemed attributable to the actions of certain agency policymakers. In this respect, therefore, fee shifting is likely to have more impact in the private sector. In most private firms, there is less likely to be a significant separation between policymakers and litigators, and there is likely greater internalization of the fee award itself.[88]

Further, an attorney fee award is not likely to be an effective deterrent to government misconduct in policy making because of the large gap in time between formulation of government policy and award of attorney fees. Litigation challenging governmental policy may span years, especially if the court remands the case back to the agency for further consideration. Even in the absence of remands, litigation over several years is not unusual.[89] In addition, the attorney fee litigation may span several more years.[90] From start to finish, therefore, the challenge to governmental policy will likely last at least a couple of years, during which political administrations or at least agency personnel might change. The lessons of an attorney fee award are likely dissipated, if not lost, with the passage of time.

In contrast to policy-making decisions, federal agencies that implement policy directives by assessing the facts of each particular case

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[86] The Department of Justice serves as the litigator for all agencies except those few, such as the SEC, with independent litigating authority.

[87] 28 U.S.C. § 593(f) (1988).

[88] Two-way fee shifting as well might force more complete internalization in both the private and public sectors, but that added deterrence might be more than counterbalanced to the extent that the prospect of paying an adversary's fees dissuades private parties from bringing meritorious actions.

[89] Challenges to the Department of Transportation's passive restraint policy provide an illustration. See Jerry L. Mashaw & David L. Harfst, Regulation and the Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257 (1987); Marianne K. Smythe, Judicial Review of Rule Rescissions, 84 Colum. L. Rev. 1928 (1984).

[90] Much attorney fee litigation lasts longer than the underlying litigation itself. See, e.g., Hensley v. Eckerhart, 461 U.S. 424 (1983); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980).

are more likely to be deterred by the prospect of an attorney fee award, whether or not the award is based on a fault standard. Such agency personnel must frequently make a cost-benefit determination whether meting out a fine or denying a benefits claim serves the public interest. Given limited enforcement or litigation resources, they must choose which cases to enforce based in part on the government's own financial exposure. Potential attorney fee liability, at least at the margins, may well encourage agency personnel to proceed with greater caution. The prospect of litigation costs might make the Federal Aviation Administration pause before levying a small fine against a pilot under a novel theory of culpability.[91]

Similarly, corporate officials implementing policy may well consider the total financial impact of their actions more fully than policymakers. A finance company, for instance, might hesitate before repossessing merchandise in part because of the fear of fee liability. Personnel managers might be wary of disciplining employees in close cases if the employees can utilize a fee shifting statute to challenge the adverse action. And, in general, there is less money at stake in implementation contexts so that the costs of litigation are likely to be considered more fully.

Moreover, if fee awards come out of the implementing agency's budget, as they largely do under the EAJA,[92] then the possibility of deterrence increases. Agency officials, like managers in private firms, are then forced to internalize the costs of their actions more fully, for they recognize that adverse fee awards may prevent them from pursuing other policy objectives.[93] That impetus for greater care, however,

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[91] Small business groups have charged that government agencies, to project the image of an aggressive watchdog, at times padded their enforcement record by filing actions against small companies hoping that such companies do not have the resources to defend themselves adequately. See Hearings on S. 265, supra note 21, at 118.

[92] 28 U.S.C. § 2412 (d)(4).

[93] Consider, for instance, the Department of Justice's Section on Civil Frauds. In determining whether to sue under the False Claims Act, 31 U.S.C. § 3730 (1988 & Supp. II 1992), officials must not only consider the likelihood of success and potential recovery, but also the costs of litigation, in terms of government employee time and potential exposure to attorney fee awards. It may be that the suit is so politically important (as for instance some suits against defense contractors or against former savings and loan directors) that cost is irrelevant, or it may be that suit is necessary as a test case notwithstanding the expense. In addition, even a costly suit may be cost effective in the long run because it may deter future false claims against the government. Nonetheless, such enforcement divisions have limited

is not as keenly felt by agencies when the award is to be paid out of the judgment fund,[94] as are most judgments for damages.[95]

In addition to possibly deterring careless policymaking and implementation decisions, fee shifting may also help deter litigation misconduct. In cases in which the smaller private parties have prevailed or are likely to prevail at the trial court (or agency) level, there may be perverse incentives on the adversary to delay the litigation and win by default because of greater resources. In the private sector, one of the first exceptions to the American rule arose in the context of a bad faith insistence upon litigation.[96] The use of sanctions under Rule 11 or similar provisions reflects the same concern for bad faith litigating.[97] One-way fee shifting provisions place a significant price tag on comparable dilatory tactics. The prospect of fee shifting should encourage attorneys, in a losing case, to pursue litigation more expeditiously.

Although stonewalling is probably not widespread among government litigators, it undoubtedly exists as in the private sector.[98] Judgment, for instance, need not be paid until "final," and finality under the judgment-fund statutes means when all possible remedies are exhausted.[99] Thus, the more the litigation is protracted, the less the

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funds, and the prospect of an attorney fee award under the EAJA may have some added deterrent force.

[94] Under Title VII and some other fee shifting statutes, fee awards are paid out of the judgment fund. See generally General Accounting Office, Attorney Fees—Judicial Awards Under Equal Access to Justice Act, 63 Decisions of the Comptroller General of the United States 260, 261 (1984) (noting that such awards are paid out of that fund).

[95] See 28 U.S.C. § 2672 (1988) (awards over $2500 paid by judgment fund).

[96] See Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962).

[97] Fed. R. Civ. P. 11 (1983 Advisory Committee Notes). See Indianapolis Colts v. Mayor of Baltimore, 775 F.2d 177 (7th Cir. 1985) (approving award of attorney fees under Federal Rule of Appellate Procedure 38 and under 28 U.S.C. § 1912 for frivolous appeal); Bankers Trust Co. v. Publicker Indus., Inc., 641 F.2d 1361 (2d Cir. 1981) (same).

[98] Compare Mattingly v. United States, 939 F.2d 816 (9th Cir. 1991) (holding government subject to Rule 11 sanctions, but not liable when counterclaim it filed was reasonable) with United States v. Gavilan Joint Community College Dist., 849 F.2d 1246 (9th Cir. 1988) (holding government liable for attorney fees for pursuing a claim without substantial justification).

[99] See 31 U.S.C. § 1304 (1988) and 28 U.S.C. § 2414 (1988). Cf. Gregory C. Sisk, Interim Attorney's Fees Awards Against the Federal Government, 68 N.C. L. Rev. 117 (1989) (arguing that interim fee awards are not permissible against the government unless authorized by specific statute). But cf. Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (despite judgment fund limitations, interim attorney fees permissible in Title VII case); Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988) (same, but in FOIA context). Fee shifting deters

compensation for the private parties absent fee shifting. And, if government attorneys can prolong litigation, they might be able to discourage other private parties from challenging governmental conduct. Indeed, many courts initially construed the EAJA to address only *litigation* misconduct by government attorneys.[100] An award of attorney fees should, therefore, plausibly ensure that government and private litigators do not needlessly protract litigation, for if they do, the penalty may be a greater award of attorney fees.

Both automatic fee shifting and fee shifting based upon an independent fault standard should, to some extent, deter litigation misconduct. But penalizing unreasonable litigation conduct under an independent fault standard could be quite costly, because it is difficult to distinguish reasonable from unreasonable litigation. Bad faith steps can perhaps be discerned after the fact, but labeling litigation tactics as unreasonable or inefficient is much more difficult. Each litigation is comprised of numerous decisions that are difficult to disaggregate, and there is always likely to be some motion or discovery request that could have been better thought out. Even a party that loses in litigation can claim that the opposing party overlitigated the case.[101] To the extent that litigation conduct needs policing, automatic fee shifting accomplishes the goal more economically, but at a possible cost of overdeterrence.[102]

As an overall means of deterring government and private firm misconduct, therefore, one-way fee shifting statutes demonstrate promise. The prospect of attorney fees may have a modest deterrent impact upon private firms engaging in small transactions with consumers and

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litigation misconduct more effectively than enhanced damage awards, which will not increase irrespective of the delay in litigation.

Fee shifting might not be as important in this respect in the private sector because the availability at times of prejudgment or postjudgment interest may diminish defense attorneys' incentive to delay.

[100] See, e.g., Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 466 U.S. 936 (1984). Fees could be awarded, not if the underlying action was arbitrary, but if the government's litigation tactics were suspect.

[101] In comparison, determining whether litigation is initiated in bad faith is a more discrete, clearly defined inquiry. Even that inquiry, however, is far from easy. See Leonard E. Gross, Contractual Limitations on Attorney Malpractice Liability: An Economic Approach, 75 Ky. L.J. 793, 820 n.71 (1986); Sandra C. Segal, Comment, It Is Time to End the Lawyer's Immunity from Countersuit, 35 UCLA L. Rev. 99, 103 (1987).

[102] See supra notes 96-100 and accompanying text and infra notes 125-30 and accompanying text.

upon those government decisionmakers who must decide how to implement government policy in fact-specific contexts, because they are more likely to assess the potential litigation costs arising from an enforcement action or denial of a government benefit. And such decisionmakers, in contrast to government officials formulating general policy, face comparably fewer internal checks prior to reaching their fact-specific decisions. Finally, fee shifting statutes may well deter government and private litigators from pursuing overly aggressive litigation tactics to frighten away smaller adversaries.

C. Compensation Role

Although one-way fee shifting statutes may have only modest success in encouraging suits and deterring wrongdoing, they more fully compensate some injured parties. There is certainly normative appeal in providing victims of wrongdoing with more complete compensation. Many have noted that compensation for injuries, whether inflicted by governmental or private agents, is hardly complete when a substantial chunk of that award may go toward attorney fees.[103] If a prevailing party can recover her physician bills, it is not clear why she cannot recover her attorney fees, since both represent out-of-pocket expenses. Congress, therefore, might plausibly subject the government or particular entities in the private sector, which rarely willingly pay full compensation to those injured at their hands, to one-way fee shifting schemes to further a general goal of compensation.[104] Or, Congress might—as it has—select particular parties involved in disputes with the government who appear most deserving of compensation for expenditure of attorney fees, such as government officials investigated by independent counsel under the Ethics in Government Act.[105]

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[103] See, e.g., 2 American Law Inst., Reporter's Study, Enterprise Responsibility for Personal Injury 269, 271-72 (1991) [hereinafter Enterprise Responsibility]; Ehrenzweig, supra note 9; Calvin A. Kuenzel, Attorney's Fees in a Responsible Society, 14 Stetson L. Rev. 283, 286-89 (1985); John Leubsdorf, Recovering Attorney Fees as Damages, 38 Rutgers L. Rev. 439, 442 (1986). Congress' infrequent enactment of fee shifting statutes to govern conduct in the private sector suggests that it has no general compensation goal.

[104] See, e.g., 28 U.S.C. § 2680(a) (1988) (listing exceptions to waiver of liability under the Federal Tort Claims Act).

[105] 28 U.S.C. § 593(f) (1988). Congress determined that senior public officials, who generally earn less than they could in the private sector, should not have to absorb the full costs of defending such investigations as long as they are not ultimately indicted and can show

Viewed as part of a compensation scheme, however, Congress' enactment of one-way fee shifting statutes seems arbitrary. Congress has not abrogated the prevailing American rule of attorney fees in the private sector; each side must generally bear its own fees, whether in tort or contract litigation. The statutory exceptions do not change the overall landscape, and plaintiffs that can now receive their fees have no stronger equitable claim to compensation than those who cannot. With respect to fee shifting against the federal government, the case for more fully compensating those who already can obtain some relief is far from compelling, given Congress' retention of governmental immunity in other contexts. Because many tort victims, for example, cannot recover at all against the United States,[106] one cannot easily ascribe to Congress an overall compensation design.

Perhaps fee shifting enactments can instead be rationalized as an effort to compensate only those injured by their adversaries' wrongdoing. From the perspective of corrective justice, the element of fault arguably supplies the necessary condition to support an award of fees.[107] Recovery should be limited to parties who can demonstrate that they incurred attorney fees due to the wrongful conduct of their adversaries. To satisfy that condition, some suggest that corrective justice principles only require compensating prevailing plaintiffs for their loss in attorney fees. Unlike defendants, prevailing plaintiffs have suffered a legal wrong that should entitle them to full compensation.[108] A legal entitlement to any relief, in other words, should bring

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that they would not have had to incur expense but for operation of the Act. Whether senior administration officials comprise a category particularly deserving of favored treatment poses another question. See also Gun Control Act, 18 U.S.C. § 924(d)(2)(A) (1988) (providing attorney fees for those forced to litigate against the United States to recover improperly seized weapons).

[106] See supra note 104.

[107] See, e.g., John C. Jeffries, Jr., Compensation for Constitutional Torts: Reflections on the Significance of Fault, 88 Mich. L. Rev. 82 (1989); Ernest J. Weinrib, Causation and Wrongdoing, 63 Chi.-Kent L. Rev. 407 (1987). But see Richard W. Wright, Substantive Corrective Justice, 77 Iowa L. Rev. 625, 695-700 (1992) (arguing that, under Aristotle's conception, unjust losses as well as unjust acts give rise to a duty to compensate). If compensation of all losses satisfies corrective justice criteria, then one-way fee shifting should be automatic, at least for plaintiffs. See infra note 108 and accompanying text.

[108] See, e.g., Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 Duke L.J. 651, 659. Cf. Charles Silver, Incoherence and Irrationality in the Law of Attorneys' Fees, 12 Rev. Litig. 301, 326-27 (1993) [hereinafter Incoherence and Irrationality] (suggesting that all plaintiffs suffering a legal wrong should be able to recover their attorney fees).

with it an entitlement to fees. Yet to prevail, plaintiffs need not always demonstrate that defendants were at "fault." Violation of a legal entitlement is an inexact proxy for wrongfulness: tort actions based on strict liability, contract breach actions, and constitutional challenges may all be successful irrespective of the fault of the defendant.

On the other hand, some prevailing defendants can plausibly claim that plaintiffs should not have brought suit[109] and thus wrongfully exposed defendants to the cost of litigation.[110] Defendants can now recover fees by proving malicious prosecution or as part of Rule 11 sanctions, but not for mere negligence. Thus, a fault-based inquiry might award attorney fees to both plaintiffs and defendants. Recovery might be appropriate either when the decision to bring the litigation or to adopt certain positions in the litigation was wrongful, or when the defendant's conduct precipitating the litigation was itself wrongful.

1. Wrongfulness of the Litigation

Fee shifting could be required whenever a party's position in litigation—whether as plaintiff or defendant—is wrongful. If one side wrongfully exposes the other side to the costs of litigation, compensation may appear warranted. For instance, most courts interpreted the EAJA in that fashion prior to the 1985 reenactment, but only to the extent that it permitted fees against the government, whether or not the government was the defendant.[111] Currently, the EAJA imposes the threat of attorney fees for "wrongful" governmental decisions to initiate litigation, but fees may be awarded against the government as a defendant irrespective of the reasonableness of the government's

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[109] Plaintiffs' failure to prevail in the litigation may manifest wrongfulness, irrespective of whether a "legal wrong" is at stake. The conduct of both plaintiffs and defendants may therefore in some sense be wrongful, or the conduct of each may be blameless. See Dan B. Dobbs, Awarding Attorney Fees Against Adversaries: Introducing the Problem, 1986 Duke L.J. 435, 445-47 (canvassing possible theories).

[110] The EAJA is a notable exception to the rule that defendants cannot recover attorney fees. Prevailing private defendants can recover from the government if the government fails to demonstrate that its decision to litigate was substantially justified. 28 U.S.C. § 2412(d) (1988). The EAJA thus cannot be squared with a normative view that only those suffering legal wrongs warrant compensation for attorney fee expenditures. See supra note 108.

[111] See supra note 100 and accompanying text.

decision to defend against suit.[112] No fee shifting statutes presently provide for recovery based solely on the unreasonableness of arguments in the litigation.

Perhaps we do not generally require payment of fees for litigation negligence because all of us in society have agreed to bear the risk and hence costs of litigation—unlike medical bills—irrespective of whether we prevail. In the long run, we may win in litigation as often as we lose. Bad faith or grossly negligent behavior might be outside the agreement and thus expose a party to fees. The persistence of the American rule of attorney fees, under which each side must bear its own litigation costs—absent egregious conduct[113]—may reflect such an understanding.

Alternatively, even if corrective justice principles support compensation for wrongful litigation conduct, it may be too difficult to determine whether one side is negligent in raising a particular argument or in presenting a particular claim.[114] Thus, even if consistent with notions of corrective justice, compensating parties for negligent litigation may be counterproductive. In any event, existing one-way fee shifting statutes are inconsistent with a litigation misconduct view of corrective justice because defendants can so rarely recover for the "wrongful" litigation efforts of their adversaries.

2. *Wrongfulness of Underlying Conduct*

Fee shifting might instead be required whenever the losing party's underlying conduct is "wrongful"[115] or otherwise gives rise to a duty

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[112] The government may have reasonable grounds to defend against suit, for example, on statute of limitations grounds, but still be liable for fees if it cannot demonstrate that its underlying position was substantially justified. See Smith v. Bowen, 867 F.2d 731, 735 (2d Cir. 1989) (stating that reasonable litigation position does not immunize government from fee award if underlying position would not be justified, and holding that reasonable underlying position does not immunize government from fees if litigation position was not justified).

[113] Parties acting in bad faith can be assessed attorney fees under the common law bad faith exception to the American rule. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-59 (1975) (providing for sanctions including attorney fees upon a finding of bad faith). See also Fed. R. Civ. P. 11.

[114] See supra note 101 and accompanying text; see also Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 Md. L. Rev. 869, 879-80 (1990) (discussing difficulty of objective determination of strategic or wrongful litigation).

[115] The same difficulty in justifying recovery based solely on compensation exists in the general negligence standard in torts. See generally Peter W. Huber, Liability: The Legal Revolution and Its Consequences (1988); Posner, supra note 7; Robert L. Rabin, The

to compensate under principles of corrective justice. For instance, the EAJA and the tax statute may be normatively attractive in requiring the government to pay attorney fees as damages whenever the government wrongfully[116] forces a private party to litigate to vindicate its interests.[117] The substantial justification standard limits payment of attorney fees to those contexts in which the government's position lacks a reasonable basis in law and fact.[118]

Under Congress' fee shifting schemes, however, large private parties and the government cannot recover their fees when they prevail in litigation, even when their adversaries are at fault.[119] Under corrective justice principles, prevailing parties injured by their adversaries' wrongdoing should be entitled to recover their fees irrespective of

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Historical Development of the Fault Principle: A Reinterpretation, 15 Ga. L. Rev. 925, 951-52 (1981).

[116] Determining when the government is at fault may itself be quite difficult. For instance, under the Ethics in Government Act, targets of investigations by independent counsel may seek reimbursement for fees as long as they have not been indicted. See supra note 105. The lack of an indictment, however, by no stretch of the imagination suggests that the investigation was wrongful.

[117] Some, however, might believe that corrective justice requires compensation not only when the government or private entity is at fault, but when the plaintiff's loss itself is wrongful. Compensation may be owed, for instance, when the government erroneously withholds benefits (and enjoys the use of the money), or deprives private parties of other entitlements, irrespective of its good faith. See Jules L. Coleman, Tort Law and the Demands of Corrective Justice, 67 Ind. L.J. 349 (1992). Compensation might not be required, however, for enforcement actions filed by government agencies that fail because reasonable enforcement initiatives do not disturb any entitlement of the target. See also supra note 108 and accompanying text.

[118] 28 U.S.C. § 2412(b) (1988). Nonetheless, wrongdoing may not be synonymous with lack of substantial justification under the EAJA or tax statute. In some contexts, the government's failure to prevail in litigation might itself reflect fault, even in the absence of a finding of no substantial justification. Private parties can prevail against the government at times only by surmounting the hurdle of deferential review under the APA—the arbitrary and capricious as well as the substantial evidence test—which incorporates a standard of wrongdoing. 5 U.S.C. § 706 (1988). At other times, private parties can prevail only if a reviewing court determines that the agency's construction of a statute is unreasonable. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-45 (1984). Doctrines of deference, in other words, may ensure that agency action is overturned only when the agency has been in some sense at fault, irrespective of the subsequent determination of substantial justification.

[119] In addition, wealthy private litigants cannot obtain fees even when the government's position is not substantially justified. Large parties, like smaller ones, arguably deserve compensation under corrective justice principles when they are injured by government misconduct. However, some schemes, like the civil rights laws, permit fee shifting to prevailing defendants if the plaintiffs' suit was frivolous or oppressive. See, e.g., Hughes v. Rowe, 449 U.S. 5, 14 (1980) (dictum).

their wealth. Although wealthy parties may benefit from fee shifting statutes such as the FOIA or the Right to Financial Privacy Act,[120] most beneficiaries of legislative fee shifting schemes have only modest means.[121] Distributive justice concerns may therefore temper application of corrective justice principles.

From the perspective of corrective justice, congressional fee shifting statutes are underinclusive in yet another way. Congress has failed to require any fee compensation when parties are tortiously injured by the government or private entities, and many other parties injured by their adversaries' wrongdoing cannot recover their fees. Moreover, some existing one-way fee shifting schemes appear inconsistent with a fault-based view of corrective justice. Fees are awarded under Title VII, for instance, even when the disagreement between the individual and the government agency or private firm has been in good faith.[122] No deferential standard shields the defendant—if the reviewing court disagrees with the agency or private firm's reading of the statute, the court may award attorney fees. The same may well be true for private retirement plans challenged under the Age Discrimination in Employment Act[123]—fee shifting under the discrimination statutes may or may not be consistent with corrective justice principles, depending upon the nature of the underlying action. Thus, while one-way fee shifting statutes are undoubtedly compensatory, most of them comport only weakly with corrective justice principles.[124]

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[120] 12 U.S.C. § 3417(a) (1988).

[121] Under the EAJA, the government need only pay fees when the party it injures is of modest size. 28 U.S.C. § 2412 (d)(2)(B) (1988). The EAJA thus obviously reflects a legislative design to equalize litigating resources and not merely to satisfy a compensation design.

[122] 42 U.S.C. § 2000e-5(k). Under the Illustrative Rules promulgated pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), judges under investigation may seek reimbursement for expenses, including fees, if they are "substantially exonerated," irrespective of the legitimacy of the investigation. James R. Browning, Collins J. Seitz & Charles Clark, Illustrative Rules Governing Complaints of Judicial Misconduct and Disability 45 (1986); see also the Clean Air Act, 42 U.S.C. § 7607(f) (1988) (permitting courts to award attorney fees "whenever it determines that such award is appropriate").

[123] See, e.g., Criswell v. Delta Air Lines, Inc., 869 F.2d 449, 451 (9th Cir. 1989). Litigation under the Truth in Lending Act may also result in fee shifting even when the defendant's conduct has been reasonable. See, e.g., Mars v. Spartanburg Chrysler Plymouth, Inc., 713 F.2d 65 (4th Cir. 1983); Postow v. Oriental Bldg. Ass'n, 455 F. Supp. 781 (D.D.C. 1978), rev'd on other grounds, 627 F.2d 1370 (D.C. Cir. 1980).

[124] Finally, even if fee shifting statutes do not fully comport with corrective justice principles, they may serve a salutary function in creating the appearance of fairness. Some

In short, Congress, as a theoretical matter, has persuasive reasons to pass one-way fee shifting provisions. The benefits from such fee shifting—increased monitoring of agencies and private firms, deterrence of agency and private wrongdoing, and more complete compensation of injured parties—may be modest on balance. However, those potential advantages go a long way toward explaining why Congress, unlike large private entities, has agreed to fee shifting provisions against its pecuniary interest.

In the public sector, the potential benefits suggest that, while Congress should not necessarily adopt across-the-board fee shifting provisions, it should selectively utilize provisions to help monitor and cabin agency implementation of policy that is not otherwise easily subject to congressional oversight. Particularly in enforcement and other fact-specific contexts, fee shifting may foster greater care if the award is to be paid out of the agency's budget. Similarly, congressional enactment of one-way fee shifting statutes to govern conduct in the private sector plausibly helps coerce compliance with governmental regulation, especially in contexts in which governmental enforcement would not be practical due to the limited impact of the challenged action. Conversely, Congress should consider repeal of one-way fee shifting statutes in contexts in which the benefits are more attenuated—such as when no incentive to litigate is needed or no internalization likely— particularly because the costs of one-way fee shifting, which can be substantial, have yet to be assessed.

II. Costs of One-way Fee Shifting

One-way fee shifting may have programmatic as well as financial costs. First, fee shifting may overdeter government actors from pursuing vigorous enforcement initiatives or implementation efforts, to the detriment of the public, or may deter private entities from productive lines of work. Second, in comparison to the American rule under which parties bear their own litigation costs, the potential for fee shifting likely makes settlement of the underlying action with the government or private firms more difficult to accomplish, and thereby

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may believe that injuries at the hands of government officials are somehow "worse" than those received at the hands of private parties, even though continuing rules of immunity are difficult to reconcile with the view that injuries suffered at government hands are *more* deserving of compensation. Under that view, members of Congress may pass one-way fee shifting statutes as part of an effort to gain their constituents' trust.

increases expenses the taxpayer or consumer must foot for the initial litigation. Third, one-way fee shifting adds a new layer of costs by introducing an additional round of litigation over the fees. Satellite litigation generates more fees for government and private attorneys and more adjudicative expense in courts and agencies. Thus, while the programmatic costs are likely to be insignificant, one-way fee shifting has the potential to impose a considerable financial burden upon taxpayers and consumers.

A. Potential for Overdeterrence

Given that one-way fee shifting statutes will only marginally deter government actors, any fear of overdeterrence seems misplaced. Fee shifting statutes should have little deleterious impact upon government policy or litigation conduct both because government actors inadequately internalize the cost of attorney fee awards, and because government actors are largely shielded by deferential standards of review. Overdeterrence is somewhat more likely in the private sector.

As an initial matter, the substantial justification standard under the EAJA and the tax statute plainly protect against overdeterrence by creating a significant cushion for government conduct—only when the government's position lacks substantial justification need the government fear an EAJA award. Indeed, Congress included the substantial justification standard to assuage administration fears of chilling effective governance.[125] The prevalence of fault standards in fee shifting statutes against the government evinces Congress' concern for protecting against overdeterrence, a concern notably absent in the private sector where Congress has frequently enacted one-way fee shifting without fault standards.

Even without the substantial justification standard, however, one-way fee shifting statutes would not likely result in overdeterring

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[125] Both the Senate and House Judiciary Committees rejected automatic fee shifting "because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts." H.R. Rep. No. 1418, supra note 11, at 13-14; S. Rep. No. 253, supra note 11, at 15; see also Hearings on S. 265, supra note 21, at 16 (May 20 and June 24, 1980) (statement of Senator Domenici) ("Providing for award of legal fees to prevailing private litigants, except where the governmental action was substantially justified, will not deter the government from pursuing meritorious governmental action."). But see id. at 19-21 (statement of Senator Nelson) (criticizing the substantial justification provision and dismissing concern about the possible chilling effect on government).

agency conduct. The line between effective deterrence and overdeterrence is of course hard to draw and is not amenable to any definitive empirical analysis. As with questions of deterrence and incentive to sue, the potential for overdeterrence depends upon the nature of the litigation. To the extent the underlying liability standard incorporates a measure of wrongdoing, there is less likely to be overdeterrence. For instance, agency officials awarding benefits are prohibited from considering the political affiliation of the claimants. Plaintiffs who challenge a denial of a claim on that ground must prove impermissible motivation by the agency.[126] Similarly, to demonstrate disparate treatment under Title VII, plaintiffs must show wrongful conduct. Encouraging suit in instances with clearly defined fault standards should not chill legitimate governmental or private pursuits because defendants are protected by a buffer of reasonableness before exposure even to liability, let alone to a fee award. In other words, there is sometimes little reason to encourage agency or private actions at the margins of the law.

In other contexts, however, the government is not clearly at fault when it loses the underlying litigation. Denials of FOIA requests, for instance, may reflect good faith interpretation of the text or of disputed factual contentions. Similarly, Department of Justice officials seeking to demonstrate false claims against the government are not protected by any fault standard—the claim depends only upon whether the evidence satisfies the statutory standards, and a reasonable construction of the statute or of the facts of the case does not ensure success.[127] Fee shifting in such contexts is akin to a tax upon losing and, in close cases, government attorneys may decide not to bring a case, or to launch a new jurisdictional argument, for fear of incurring greater fees.[128] Although officials making fact-specific

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[126] Cf. Spencer Rich, Denial of Benefits to Blacks May Signal Bias, GAO Says, Wash. Post, May 12, 1992, at A17 (discussing GAO study that unearthed racial disparities in agency determinations of eligibility for social security benefits); General Acct. Off., Social Security: Racial Difference in Disability Decisions Warrants Further Investigation, GAO/HRD-92-56 (April 1992).

[127] See, e.g., Crandon v. United States, 494 U.S. 152, 167-68 (1990) (rejecting government suit to recover for false claims despite plausible reading of statute); see also United States v. Boeing Co., 747 F. Supp. 319 (E.D. Va. 1990) (awarding private party's EAJA claim in same case), rev'd, 957 F.2d 1161 (4th Cir. 1992) (disallowing party's EAJA claim because, in part, government's position was "substantially justified").

[128] As discussed earlier, if the fee award is to be paid out of the judgment fund, there should be less concern for overdeterrence. See supra notes 94-95 and accompanying text.

determinations may be affected at the margins, those officials may have sufficient nonmonetary incentives in bringing enforcement actions or contract claims to negate the potential for overdeterrence. Such government officials would realize that, even if there is a risk of paying fees when trying to set new precedent, overturn old precedent, or set an example for other private parties, those goals should be well worth the modest price.

Moreover, as when the underlying liability standard is based on fault, there is less risk of overdeterring government agencies when their actions are protected by a deferential standard of review. Standards such as "substantial evidence in the record" or "arbitrary and capricious" create a safe harbor for agency officials implementing policy at the outskirts of their authority. For instance, providing an incentive for private parties to sue under the APA will not likely overdeter agency officials. Officials who recognize that their decisions will be sustained by substantial evidence in the record will not readily be overdeterred by the prospect of fees because of the margin of safety created by the deferential standard.[129]

Fee shifting conceivably might overdeter government litigators, even if it would not affect the underlying conduct of agency officials. Government attorneys would recognize that novel jurisdictional or statutory arguments come with a price, namely that unsuccessful arguments raise the amount of attorney fees paid to prevailing private parties. Yet, if the amount or principle at stake in the litigation is significant enough, and the arguments are plausible, government attorneys should have ample incentive to litigate as vigorously as possible. Thus, given that government litigation costs are not well-internalized (and rarely paid by the governmental entity litigating the case), fee shifting would be unlikely to alter the conduct of government litigation counsel. Congress could conclude that, at the margin, the taxpayer is better off if government litigators use caution in contesting challenges to governmental action.

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[129] Finally, even if fee shifting has some potential for skewing governmental action, some might welcome the incentive for caution. Those mistrusting governmental regulation and enforcement might embrace one-way fee shifting as a beneficial restraint upon governmental intrusion into the private sector. Indeed, members of Congress might favor fee shifting as a way to instill more caution in agency officials. See Hearings on S. 265, supra note 21, at 21 (statement of Senator Nelson) ("That's exactly what we want, a chilling effect. Government should not be pursuing cases where they can't prevail.").

Overdeterrence from fee shifting would be more likely in the private sector, just as it would be for enhanced damage awards. First, there are rarely deferential standards of review (e.g., business judgment rule) to protect such firms. Second, private firms are more likely than government agencies to internalize the costs of fee awards. Third, one-way fee shifting statutes in the private sector are not typically based on fault.[130] For example, damages may be awarded under the TILA for technical violations, irrespective of the reasonableness of the firm's conduct. Thus, even if there may be greater need for deterrence in the private sector due to the absence of political checks, there is also greater risk of overdeterrence due to the responsiveness of private firms to monetary sanctions. Those two opposing factors make it quite difficult to generalize, in the absence of empirical evidence, as to the desirability of one-way fee shifting in the private sector.

In short, while the prospect of overdeterrence exists, the prospect is neither certain nor particularly daunting. Overdeterrence is unlikely if a deferential standard of review protects the government decisionmaker or if there is little positive benefit to be derived from governmental or private conduct at the margins of the law. Moreover, there should be little fear of deterring novel arguments in the underlying litigation as long as the litigation is important enough. From a programmatic perspective, therefore, one-way fee shifting—particularly if reserved for case-specific governmental actions and conduct by private firms not otherwise subject to effective oversight—should produce far more benefits than costs.

B. Impact on Settlement

Theoretically, even if one-way fee shifting does not interfere with legitimate government or private conduct, it should make the underlying dispute more difficult to resolve. The likely disagreements over whether liability for fees exists and over the amount of attorney fees that would be recoverable increase the odds that the parties will not settle the underlying suit.[131]

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[130] See supra note 123 and accompanying text. Exceptions exist. See, e.g., Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(e) (1988) (violation demonstrated only after defendant afforded reasonable time to cure).

[131] Provision of punitive damage awards would also add a new issue for disagreement, though the potential for a large award could force the government or private party into

In the absence of fee shifting, private parties would be likely to settle if their expected recovery is less than their adversary's expected loss or if their expected loss is greater than their adversary's expected gain. Viewed another way, the parties would be likely to settle if plaintiff's estimate of the expected judgment exceeds defendant's estimate by less than the sum of their anticipated legal costs.[132] Obviously, there are pragmatic reasons why settlement might not occur even under these circumstances—the precedential value that could be gained by a formal ruling, strategic bargaining, lack of information, or other reasons—but many cases would settle, particularly if they involve financial issues with little systemic impact. Assuming risk neutrality and insignificant settlement costs, the parties would determine whether to settle by discounting the possible outcomes of their litigation by their probability of success.[133] For instance, if plaintiff has a $10,000 claim, an eighty percent chance of prevailing and anticipates expending $2000 in legal fees, its expected gain is $6000. Assume that the defendant believes that it has a fifty percent chance of losing and estimates its trial costs to be $1500. The defendant therefore likely would lose $6500 from the litigation. The difference between plaintiff's expected gains of $6000 and the defendant's expected loss of $6500 creates a "positive" bargaining range of $500 in which both parties have the incentive to settle.[134]

If one-way fee shifting applies, however, the potential for settlement diminishes. In the same hypothetical, the plaintiff now believes it has not only expected gains of $6000 but also an eighty percent chance of recovering its $2000 in expenses, for a total expectation of $7600. The

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making a settlement favorable to plaintiff. See William Breit & Kenneth G. Elzinga, Antitrust Penalty Reform 39-41 (1986). Two-way fee shifting should make settlement even less likely. Shavell, supra note 7, at 67; Rowe, supra note 8, at 159.

[132] See Shavell, supra note 7, at 63. In cases in which the plaintiff's estimate of the probability of success exceeds that of defendant, the joint expected legal costs are lower, reducing the possibility of settlement. Id. at 67; Rowe, supra note 8, at 157; cf. Schwab & Eisenberg, supra note 56, at 755 (hypothesizing that the government is generally less risk averse than its opponents).

[133] Shavell, supra note 7, at 57. The incentives to settle should be identical whether the government is plaintiff or defendant.

[134] This relationship can be expressed algebraically to suggest that the private plaintiff will settle if $px - a \leq qy + b$, where p = plaintiff's expectation of prevailing; x = plaintiff's estimate of judgment; a = plaintiff's expected legal fees; q = defendant's expectation that plaintiff will prevail; y = defendant's estimate of adverse judgment; and b = defendant's expected legal fees. For similar analysis, see id. at 63-68.

defendant in turn now has an expected loss of $7500.[135] The bargaining gap is now negative,[136] and settlement would be unlikely.[137]

Under fee shifting statutes such as the EAJA or the Back Pay Act, which are based upon an independent assessment of fault, private parties would have less chance of prevailing on the fee portion than on the merits, and the government correspondingly would have a greater chance on the fee portion than on the merits. In comparison to automatic fee shifting schemes, the gap between the government and private parties' estimate of fee exposure would likely be greater. Settlement therefore would be, in general, least likely under a one-way fee shifting scheme based on fault. For instance, if the private party assumed it had a sixty percent chance of recovering its expenses, then its overall expectation would be $7200. In turn, if the government apprised its fee liability as only twenty percent, then its expected loss approaches $6900. Accordingly, settlement would be even more difficult than under automatic fee shifting.[138] This result is intuitive—when parties have more to disagree over, the prospect of agreement

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[135] The figure might be somewhat higher because of the possibility that the defendant in addition would ultimately be required to pay fees for the fee litigation. Whenever the defendant sets its chance of prevailing higher than the plaintiff, one-way fee shifting should narrow, if not eliminate, the bargaining range in which settlement is possible.

[136] If government litigators do not internalize the cost of government litigation, the bargaining gap would be even more negative and settlement correspondingly less likely. To that extent, settlement might be more likely in the private sector because of the greater internalization of litigation costs.

[137] Under a one-way fee shifting scheme, private plaintiffs will settle if $px - (1-p)a \leq qy + b + qa$, where p = plaintiff's expectation of prevailing; x = plaintiff's estimate of judgment; a = plaintiff's expected legal fees; q = defendant's expectation that plaintiff will prevail; y = defendant's estimate of adverse judgment; and b = defendant's expected legal fees.

Even if the bargaining gap is not negative, a compressed bargaining range may make settlement more difficult. To be sure, the wider the settlement range, the more likely it is that the problems of bilateral monopoly bargaining will prevent the parties from reaching a compromise. See, e.g., Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. Legal Stud. 93, 113-14 (1986). But, at the same time, the larger bargaining range means that more points are mutually beneficial and, therefore, that the parties may be more likely to determine that settlement is in their mutual interests. Posner, supra note 7, at 523.

[138] Under one-way fee shifting statutes based on fault, private plaintiffs will likely settle when $px - (1-p')a \leq qy + b + q'a$, where p = plaintiff's expectation of prevailing; x = plaintiff's estimate of judgment; p' = plaintiff's expectation that it will recover fees; a = plaintiff's expected legal fees; q = defendant's expectation that plaintiff will prevail; y = defendant's estimate of adverse judgment; b = defendant's expected legal fees; and q' = defendant's expectation that plaintiff will recover fees. Whenever the difference between pa and qa is less than the difference between p'a and q'a—or, in other words, whenever the gap

dims. Of course, other factors are involved in settlement decisions,[139] but in most cases the prospect of one-way fee shifting, particularly under a fault standard, should make settlement more difficult to obtain.

Many instances of litigation do not involve money per se and settlement of nonfinancial issues is typically far more difficult to obtain even without fee shifting. Moreover, suits involving money may readily implicate principles extending far beyond the case at hand. That one-way fee shifting in theory makes settlement of all claims marginally more difficult, therefore, probably has less tangible impact than might otherwise be expected. Nonetheless, passage of one-way fee shifting statutes, particularly under fault-based systems, has made settlement of the underlying suits—at least as a theoretical matter—slightly more difficult to achieve.

C. Litigation Costs

In addition to making settlement less likely, one-way fee shifting statutes have significant impact in increasing overall litigation costs. The Supreme Court has decried the tendency for fee litigation to dwarf the underlying dispute between private litigants and the government,[140] resulting in, as Justice William J. Brennan, Jr., noted, socially unproductive litigation, "which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake."[141] One-way fee shifting thus adds substantial costs to litigation—even aside from the possible impact on settlement of the underlying dispute—by increasing attor-

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between the private party and its adversary's expectation of a fee award widens—there is less chance of settlement under fee shifting schemes based on fault.

[139] One-way fee shifting under the EAJA and other fault-based statutes probably creates a perverse incentive to litigate the fee dispute. Anecdotal evidence suggests that government attorneys view some awards of attorney fees as stigmatizing because of the prerequisite determination that the government's actions were not substantially justified. Few attorneys believe that the policy or enforcement choice they are defending is unreasonable, and thus few are willing to concede that a prevailing party is entitled to fees under the current standard. Settlement of the fee dispute is thus less likely because of the understandable reluctance to label the government's conduct, and by extension one's own conduct, as unreasonable.

[140] See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 722 (1987) ("Fee litigation . . . is often protracted, complicated, and exhausting. There is little doubt that it should be simplified to the maximum extent possible."); Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

[141] *Hensley*, 461 U.S. at 455 (Brennan, J., dissenting).

ney time and the time of adjudicators in both the judiciary and agencies that also must ultimately be paid for by the taxpayer or consumer.[142]

Consider the United States Army Corps of Engineers' unsuccessful effort to combat fees in *Golden Gate Audubon Society, Inc. v. United States Army Corps of Engineers*.[143] The prevailing plaintiffs originally requested $43,420 in fees after the court determined that the government had not been substantially justified in refusing to file an environmental impact statement. Government attorneys nonetheless challenged the fee request on a number of grounds: the reasonableness of hours expended in the summary judgment motion, the reasonableness of hours expended prior to filing the complaint, nonproductive and duplicative work, etc. As the district court remarked:

> Ironically, that portion of plaintiffs' current claim *not* challenged by federal defendants amounts to $34,012, nearly 80% of the original claim. Thus, in retrospect, it appears that by intensively litigating the fee petition, federal defendants caused plaintiffs to incur approximately $31,000 in additional expenses (to say nothing of the significant portions of defendants' *and* the court's time that were also consumed) in order to potentially save approximately $9,408.[144]

The *Golden Gate Audubon Society* case could be viewed as aberrational,[145] or it could be explained as a purposeful effort to deter future fee claims. But it suggests a more important point, namely that there are significant hidden costs in litigation spawned by one-way fee shifting, costs in terms of attorney time and judicial resources. Those costs are likely to be particularly high when fee shifting statutes contain many issues that the parties may dispute. The more room for disagreement, the less likely it is that the fee dispute will be settled

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[142] To the extent fee shifting successfully deters arbitrary conduct, there may be a corresponding savings in litigation costs because of the diminished occasions for future litigation. The trade-off between increased litigation expense and future savings is of course quite difficult to measure empirically. Nonetheless, streamlining satellite litigation is unlikely to jeopardize the potential future savings in litigation costs as long as fees are still awarded sufficient to provide incentive for suit and to force more complete internalization of the wrongdoing. For an empirical study and suggested revisions of the Equal Access to Justice Act, see Krent, supra note 61.

[143] 732 F. Supp. 1014 (N.D. Cal. 1989).

[144] Id. at 1022 n.12.

[145] There are of course other instances. See, e.g., Trichilo v. Secretary of HHS, 832 F.2d 743 (2d Cir. 1987) (involving award to plaintiff of over $10,000 in attorney fees to recover a fee claim worth less than $1000).

and the greater the litigation costs. In civil rights litigation, for instance, the parties may dispute prevailing party status,[146] the reasonableness of awarding a fee given the results achieved,[147] the reasonableness of the hours expended,[148] the reasonableness of the hourly rate sought,[149] the propriety of an enhancement for delay in payment,[150] and the potential reduction for claims that were ultimately unsuccessful.[151]

Much of the complexity stems from an unexamined premise that fee shifting mechanisms must mimic the market. Thus, courts—at the implicit direction of Congress—have compensated parties on the basis of what a flat fee, lodestar, or contingency arrangement would have produced,[152] with the lodestar method generally prevailing.[153] The steps of such calculations are far from precise and hence subject to continual second-guessing.[154]

The market-based approach to fee shifting suffers from two conceptual flaws. First, a market approach cannot work unless there is an easily defined market.[155] There is no market for some cases covered under fee shifting statutes, such as for injunctive actions under the

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146 Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989).

147 Farrar v. Hobby, 113 S. Ct. 566 (1992).

148 City of Riverside v. Rivera, 477 U.S. 561 (1986).

149 *Hensley*, 461 U.S. at 424.

150 In Missouri v. Jenkins ex rel. Agyei, 491 U.S. 274, 283-84 (1989), the Supreme Court approved an enhanced award for delay in payment under 42 U.S.C. § 1988 (1988), but courts have declined to approve a delay enhancement under the EAJA. See, e.g., Perales v. Casillas, 950 F.2d 1066 (5th Cir. 1992); Chiu v. United States, 948 F.2d 711 (Fed. Cir. 1991).

151 *Hensley*, 461 U.S. at 424. See generally Charles Silver, Unloading the Lodestar: Toward a New Fee Award Procedure, 70 Tex. L. Rev. 865 (1992) (addressing vagaries of current system of calculating fee awards).

152 See generally Mary Frances Derfner & Arthur D. Wolf, Court Awarded Attorney Fees § 15.01 (1992) (discussing methods that courts use to calculate fees).

153 See, e.g., City of Burlington v. Dague, 112 S. Ct. 2638 (1992); Derfner & Wolf, supra note 152.

154 The Federal Courts Study Committee reported in 1990 that the lodestar method, which predominates, "unduly burden[s] judges." Federal Courts Study Comm., Report of the Federal Courts Study Committee 104 (1990). See also The Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 246-48 (1985) (criticizing the loadstar approach for being overly subjective and for "creat[ing] a disincentive for the early settlement of cases."). See supra text accompanying notes 146-51.

155 Judge Posner has written that "we should let the market direct the allocation of [legal] services in cases where there is an effective market in them . . . ." Merritt v. Faulkner, 823 F.2d 1150, 1158 (7th Cir. 1987) (Posner, J., concurring). Ascertaining whether an effective market exists for legal services is problematic, to say the least. Many dispute, for example, Judge Posner's belief that an effective legal market exists for prisoner claims.

Civil Rights Act or for small claims under the TILA; that is why fee shifting is important in the first place. A market-based approach in such cases is purely a fiction. Indeed, a fee shifting provision transforms the market, making it even more difficult to replicate the market outcome absent the prospect of fee shifting.

To be sure, some have argued that, even though a market for particular cases does not exist, a readily ascertainable market for legal services does.[156] Professor Silver, for instance, recommends compensating civil rights attorneys for their loss in opportunity costs—the compensation they could have received as plaintiffs' injury lawyers, corporate bond attorneys, divorce lawyers, or whatever.[157] In other words, attorneys who prevail in fee shifting cases should receive pay comparable to what they could have earned in their other work.

But compensating attorneys through their opportunity costs is surely more generous than necessary. Many attorneys in large corporate firms, for instance, would doubtless prefer working on civil rights cases if they could be assured the same compensation. Others would switch to civil rights cases at a lesser price because they might prefer the working conditions or psychic satisfaction of that line of work. Their willingness to switch would even be greater if offered the possibility of civil rights work on a part-time basis, maintaining the greater compensation for the rest of their work.

Prosecutors, for instance, earn far less than their opportunity costs. Many attorneys would rather be prosecutors than corporate bond counsel—whether because of a desire for trial work, interest in public service, or political ambition—irrespective of the lesser pay. The gov-

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[156] See Silver, supra note 151, at 871-99; Silver, supra note 108, at 326 (arguing that "[t]he point of mimicking the market is to ensure that persons who have only fee awards to offer can bid successfully for lawyers' time and are fully compensated for fee-related obligations they reasonably incur."); John Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473, 481-82 (1981); Richard L. Schmalbeck & Gary Myers, A Policy Analysis of Fee-Shifting Rules under the Internal Revenue Code, 1986 Duke L.J. 970, 994.

[157] Silver, supra note 151. Professor Silver urges calculation based on the contract between client and counsel. He does, however, recognize that under his proposal, the client has little incentive to haggle over the terms of the fee contract because payment is contingent on an award of fees after the litigation. Moreover, the recommended scheme is far from streamlined. For instance, how can one gauge the prevailing market rate of public interest attorneys, professors working pro bono, or attorneys new to the market? The imprecision may not be fatal given the shortcomings of any compensation system, but it exacerbates the problem of excessive satellite litigation. See id. at 901-16 (advocating use of judicial officials to screen for prevailing market rates, to police overreaching, etc.).

ernment sets the pay of prosecutors (or judges) to ensure a supply of qualified officials without resort to the opportunity costs of those filling the positions.[158] If the government sets the level of compensation too low, it can elevate the compensation to attract more counsel. Just as the pay of prosecutors (or judges) need not be pegged to prevailing market rates to attract sufficient as well as talented applicants, so the compensation of attorneys accepting fee shifting cases need not match counsel's opportunity costs. The quest should therefore not be to compensate based on counsel's opportunity cost, but rather to change market incentives by encouraging counsel to forego other opportunities to accept fee shifting cases. The opportunity costs model in essence strives to replicate the market based on wrong data.

Second, we do not know enough about the market to be confident that mimicking it, if we could, would provide the optimal amount of attorney services. The previous discussion highlighted the many factors that contribute to whether fee shifting provides an incentive to sue as well as a deterrent to continued wrongdoing. For example, one must determine how many attorneys would agree to take such cases in the absence of fee shifting, to what extent fee shifting provides an extra incentive, whether that extra incentive induces the "correct" number of new suits given the externalities at stake and whether those new suits add materially to deterrence. Although our current complicated means of calculating the fee could be improved,[159] the entire quest to mimic the market may be misguided.[160] The aim of fee shift-

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[158] Few firms entering the market will offer to pay job applicants their opportunity costs for joining the new firm. The potential inefficiency should be apparent. Rather, firms set the rate of compensation to attract qualified employees, and they can raise their offer if dissatisfied with the results.

[159] See supra note 157.

[160] The Supreme Court, also led astray by the market analogy, has held that a prevailing party cannot recover fees when it recovers only nominal damages but had sought a much higher pay off. *Farrar*, 113 S. Ct. at 566. The Court reasoned that " '[w]here recovery of private damages is the purpose of . . . civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.' " Id. at 575 (quoting *City of Riverside*, 477 U.S. at 561). Yet, if the purpose of fee shifting statutes is to enable plaintiffs to sue when they could not otherwise afford an attorney, as well as to deter continued wrongdoing, the award of only nominal damages should not preclude award of fees. Fee shifting statutes should afford plaintiffs the ability to challenge every violation of their rights, without regard to the amount of damages recovered. See *City of Riverside*, 477 U.S. at 561 (rejecting model of compensating attorneys based on level of benefits generated for client or society at large); see also Silver, supra note 151, at 943-48 (agreeing that fees cannot be pegged to significance of result achieved in a particular case).

ing is to provide further incentive to sue and to deter failure to comply with federal directives, not to remedy a market failure per se.

To minimize complexity and the costs of satellite litigation, Congress could experiment with brighter-line payment mechanisms, perhaps stipends or fixed hourly rates.[161] Congress need not confine itself to two models—market-based or direct stipend—but can provide incentives in various intermediate ways. Congress has, for instance, provided a flat fee for most work under the Criminal Justice Act.[162] To be sure, the flat fee under that Act[163] in all likelihood undercompensates attorneys from a market perspective, but it nonetheless provides some incentive for attorneys to undertake such representation. The capped fee under the EAJA[164] represents another way to lessen complexity while still permitting attorneys to fulfill a gatekeeping role of winnowing substantial from insubstantial claims. Congress can always raise the fee cap if experience demonstrates that too few attorneys have accepted fee shifting cases. By freeing fee shifting from a market paradigm, a more streamlined, efficient payment system can be attained.

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[161] Other means to provide incentives of course exist. For instance, under the Social Security Act, 42 U.S.C. § 406(b)(1) (1988), Congress provided that it would withhold a reasonable attorney fee, not to exceed 25% out of back disability benefits awarded, thus guaranteeing counsel at least partial payment. That section encourages counsel by minimizing the risk of nonrecovery from generally impecunious clients. In other words, there are mechanisms besides the lodestar which can be used to encourage representation without fueling satellite litigation.

[162] 18 U.S.C. § 3006A(d)(1) (1988); see also In re Berger, 498 U.S. 233, 236 (1991) (per curiam) (refusing to compensate attorneys representing capital defendants on a case-by-case basis because "[s]uch an inquiry is time consuming, its result is necessarily imprecise, and . . . [i]t would not be a wise expenditure of this Court's limited time and resources").

[163] Currently, the government pays $60 for each hour expended in court and $40 for each hour expended out of court up to the capped amounts, depending on the nature of the representation. 18 U.S.C. § 3006A(d)(1) (1988). Gatekeeping under the Criminal Justice Act is performed by Congress (and to a lesser extent courts, which appoint attorneys on a case-by-case basis to represent prisoners filing civil rights actions) instead of by attorneys—Congress decides which parties warrant representation.

[164] Currently, the cap is $75 plus a cost of living increase, 28 U.S.C. § 2412(d)(2)(A) (1988), dating from 1981, which sets most fees at the $105 to $120 range. See, e.g., DeWalt v. Sullivan, 963 F.2d 27 (3d Cir. 1992) (setting fee at $105.91 per hour); Wonders v. Shalala, 822 F. Supp. 1345 (E.D. Wisc. 1993) (setting fee for 1991 at $112.38 per hour); Thomas v. Shalala, No. 91 C 5488, 1993 WL 112534 (N.D. Ill. April 8, 1993) (setting fee at $115.95 per hour). Of course, Congress could raise these rates if they become insufficient to attract counsel. Inclusion of a cost of living increase may obviate the Court's necessity to refine the system continuously.

Congress should therefore reduce the costs of collateral fee litigation, which almost exclusively benefits attorneys in the public and private sectors. The more complex the fee statute, the less likely the underlying dispute with the government can be settled and the greater the litigation costs. From the taxpayer or consumer's perspective, the policy benefits of one-way fee shifting must be assessed against the backdrop of increased litigation costs both in the underlying action and in the fee dispute.

CONCLUSION

There is little question but that public interest groups and private attorneys who litigate frequently against the federal government benefit from one-way fee shifting. Yet their gain is not necessarily the public's loss. One-way fee shifting may lead to more effective governance by providing an incentive for small parties and public interest groups to contest government overreaching and by forcing government agencies to take into account more fully the costs of their actions. In the private sector, one-way fee shifting may encourage firms to comply with federal regulation. Payment of attorney fees may also help rectify wrongs committed by both government officials and private firms. Although taxpayers and consumers foot the bill for one-way fee shifting—and those bills can be minimized considerably—they may also benefit from more careful private and government action.

This is not to suggest that the fears expressed by the former President's Council on Competitiveness are totally unfounded. One-way fee shifting may not be needed in many contexts and may be quite inefficient in others. Private attorneys, public interest groups, and individuals likely to litigate against certain private firms and the government share an obvious incentive to expand the one-way fee shifting mechanisms that exist. Nevertheless, Congress should consider utilizing one-way fee shifting mechanisms as an ancillary means of monitoring agency conduct and deterring agency wrongdoing, just as it should in monitoring and encouraging compliance with federal regulation in the private sector. One-way fee shifting is probably most effective in providing an incentive for private parties of modest means to challenge governmental and private action more vigorously when there is no significant monetary stake. Moreover, fee shifting would most likely deter arbitrary conduct by parties sensitive to litigation

costs—private firms and government officials implementing policy in narrow contexts. At the same time, the potential for adverse policy ramifications is least when the government's or private party's underlying liability is conditioned on fault.

The public choice and public policy stories may in fact converge: Congress in part has chosen public interest groups and elements of the private bar as means to oversee agency and private conduct. The self-interested behavior of the private bar and watchdog groups may redound to the benefit of the public. Concern for the inefficiencies of one-way fee shifting, therefore, should not eclipse its possible utility in contributing to the public weal.